13

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914/15

No. [redacted] 269

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

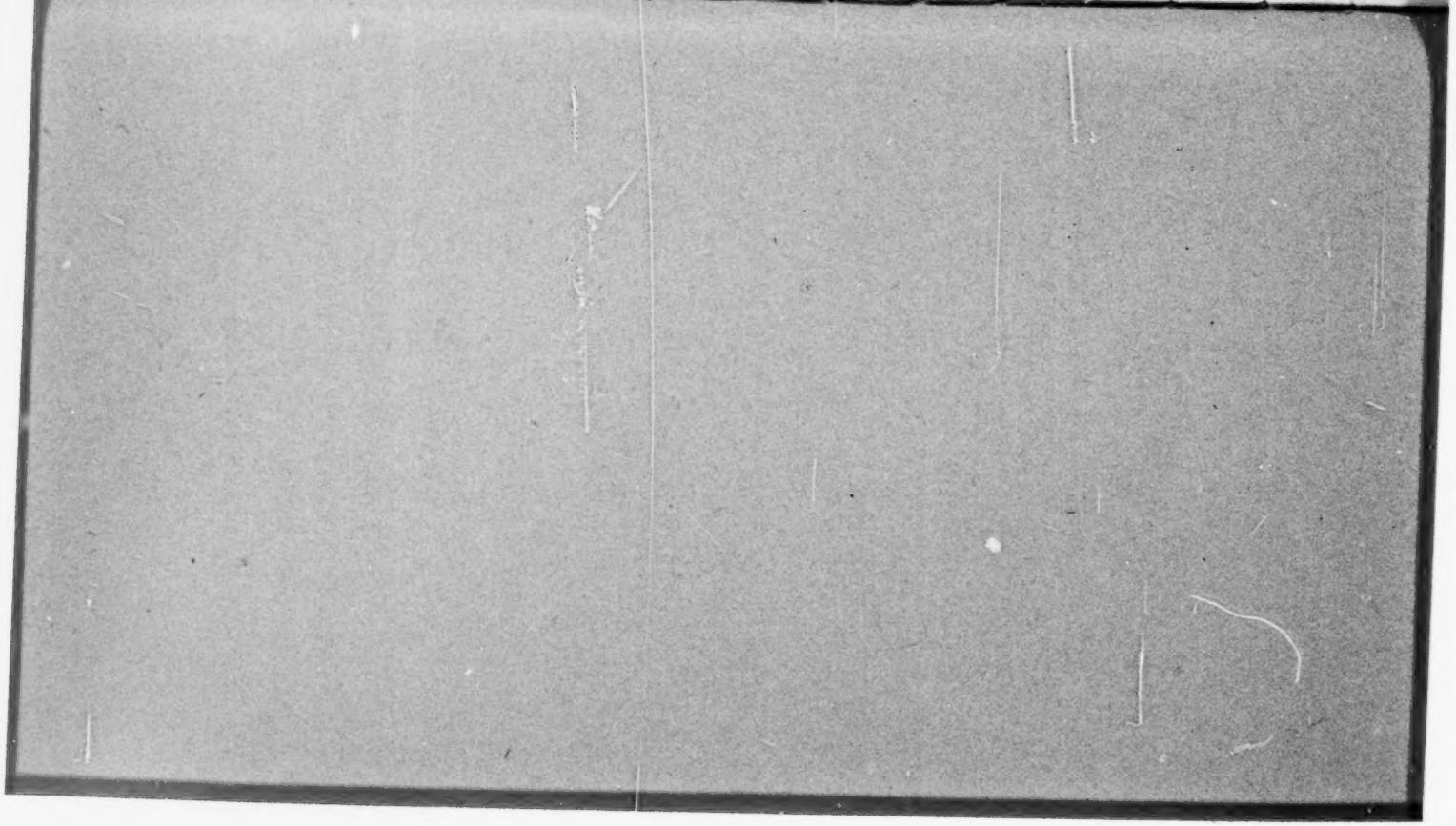
vs.

S. W. KENNEY, ADMINISTRATOR OF BEB ISAAC CAPEHART, ALIAS BEB ISAAC EASON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED OCTOBER 22, 1914.

(24,411)



(24,411)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 667.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

S. W. KENNEY, ADMINISTRATOR OF BEB ISAAC CAPEHART, ALIAS BEB ISAAC EASON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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a In the Supreme Court of North Carolina, August Term, 1914, Third District.

No. 105.

S. W. KENNEY, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason,

vs.

SEABOARD AIR LINE RAILWAY.

Petition for Writ of Error.

To the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina:

Seaboard Air Line Railway, the defendant in above entitled action, respectfully shows:

That the Supreme Court of North Carolina, which is the highest Court in the State of North Carolina, in which a decision in the said action could be had, at the August Term, 1914, of said Court, rendered judgment adverse to this petitioner.

That in the proceedings had and judgment rendered, certain errors were committed to the prejudice of the petitioner, all of which more fully appears in the assignment of errors filed herewith.

Therefore, considering itself aggrieved by the said final decision of the Supreme Court of North Carolina in rendering judgment against it in the above entitled case, your petitioner hereby prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correction of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States, and that the decision and judgment of the Supreme Court of North Carolina may be reversed and annulled.

MURRAY ALLEN,
Attorney for Seaboard Air Line Ry.

b STATE OF NORTH CAROLINA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Seaboard Air Line Railway to S. W. Kenney, administrator of Beb Isaac Capehart, alias Beb Isaac Eason, in the sum of Two Thousand Dollars.

WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

Dated October 14, 1914.

c In the Supreme Court of North Carolina, Fall Term, 1914.

No. 105.

SEABOARD AIR LINE RAILWAY
vs.
S. W. KENNEY, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason,

Assignment of Errors.

Now comes the above named plaintiff in error and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments:

This is an action brought by S. W. Kenney, administrator of Beb Isaac Capehart, alias Beb Isaac Eason, to recover damages for the death of his intestate, who was at the time of his death employed as brakeman on one of defendant's trains. It was admitted by counsel for plaintiff and defendant that at the time of the death of plaintiff's intestate, the defendant was engaging in interstate commerce; that defendant's train was being operated between Lewiston, N. C. and Boykins, Va., and was transporting interstate commerce, and that plaintiff's intestate was employed by the defendant and was killed by the train while employed on that train on the particular occasion when defendant was running it and while plaintiff was employed by defendant in interstate commerce.

This makes the case one arising under the provisions of the Federal Employers' Liability Act, approved by Congress of the United States, April 22nd, 1908, and the provisions of the first section thereof are determinative of plaintiff's right to maintain his action. It is admitted in the record and also appeared from plaintiff's evidence that plaintiff's intestate was an illegitimate child; that he died intestate leaving no widow or children, and that his mother is dead. It also appeared that the alleged beneficiaries are
d the children of the intestate's mother born in wedlock.

It was held by the trial court and by the Supreme Court of North Carolina on appeal that the children of the mother of plaintiff's intestate, born in wedlock are the next of kin of plaintiff's intestate and that the administrator is entitled to recover for their benefit.

Seaboard Air Line Railway, defendant in the court below, and plaintiff in error in the Supreme Court of the United States, respectfully assigns as error in the record and proceedings in this cause in the Supreme Court of North Carolina, the following:

The Supreme Court of North Carolina erred in its construction of the Federal Employers' Liability Act, a statute of the United States, approved by Congress on April 22nd, 1908, especially in its construction of Section 1 thereof, and by this error the Supreme

Court of North Carolina decided against the rights set up and claimed by your petitioner under the said statute.

The said errors are more particularly set forth as follows:

First. The Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by your petitioner under Section 1 of the said Federal Employers' Liability Act in construing the words "next of kin," as meaning next of kin as fixed by State statute and not as determined by the common law, and in holding that the plaintiff was entitled to recover damages for the death of his entestate, who was an illegitimate child, for the benefit of the children of his mother born in wedlock.

Second. The Supreme Court of North Carolina committed error and its decision was against the rights set up and claimed by your petitioner under Section 1 of said Federal Employers' Liability Act, in holding that there was sufficient evidence to be submitted to the jury on the question of the dependence upon the intestate of the children of the mother of plaintiff's intestate, born in wedlock, and in holding that plaintiff was entitled to recover damages for the benefit of said children, caused by the death of the intestate.

Third. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to grant defendant's motion for judgment of non-suit made at the conclusion of plaintiff's evidence and at the conclusion of all the evidence, upon the ground that the plaintiff left surviving no next of kin, as fixed by Section 1 of the Federal Employers' Liability Act and left surviving him no next of kin dependent upon him for whose benefit this action could be maintained, and upon the ground that it did not appear that the father of plaintiff's intestate was dead. Defendant's exceptions No. 1 and No. 7.

Fourth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury as follows: "If you believe the evidence you will answer the first issue 'No,' the first issue being 'Are Sills Hardy, Joe Hardy and Nettie Hardy next of kin of the intestate, Beb Isaac Capehart, alias Beb Isaac Eason, as alleged in the complaint?'" Defendant's exception No. 8.

Fifth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to grant defendant's request for a directed verdict as follows: "The defendant requests the court to direct a verdict in its favor on the ground that the right of plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, and the evidence shows that the plaintiff's intestate did not leave surviving any next of kin dependent upon him" Defendant's Exception No. 9.

Sixth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury, as follows: "The Court charges you that unless you find by the preponderance of the evidence, the burden of proof being upon the plaintiff, that Beb Isaac Eason, or Beb Isaac Capehart, was born in lawful wedlock, you will

answer the issue of damages 'Nothing' ". Defendant's Exf ception No. 10.

Seventh. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury, as follows: "The Court charges you that if you find from the evidence that plaintiff's intestate, Beb Isaac Eason, or Beb Isaac Capehart, was the son of W. C. Eason and that W. C. Eason was not the lawful husband of Emaline Capehart, you will answer the issue of damages 'Nothing.'" Defendant's Exception No. 11.

Eighth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury as follows: "The Court instructs you that by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, the plaintiff's right to recover in this action is dependent upon Beb Isaac Capehart, or Beb Isaac Eason, plaintiff's intestate, having left surviving him next of kin dependent upon him, and the Court instructs you that it appearing from plaintiff's evidence, that plaintiff's intestate was an illegitimate child, the parties named in the complaint for whose benefit this action is brought, are not plaintiff's intestate's next of kin, and you will answer the first issue 'No.'" Defendant's Exception No. 12.

Ninth. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in instructing the jury as follows: "If the jury shall find from the evidence that Beb Isaac Capehart, Sills Hardy and Nettie Hardy, were all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead; that Beb Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.'" Defendant's Exception No. 13.

Tenth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing defendant's g motion for judgment non *obstanti* veredicto. Defendant's Exception No. 16.

Eleventh. For that the Supreme Court committed error in upholding the trial court in its refusal to grant a new trial for errors committed during the trial. Defendant's Exception No. 17.

Twelfth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to set the verdict aside. Defendant's Exception No. 18.

Thirteenth. For that the Supreme Court of North Carolina committed error in refusing to sustain defendant's exception to the judgment signed by the trial court. Defendant's Exception No. 19.

Fourteenth. For that the Supreme Court of North Carolina committed error in rendering the final judgment against the defendant, Seaboard Air Line Railway, and which is complained of in this case.

Fifteenth. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it de-

nied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity, of being governed in respect of plaintiff's right to recover in this action, solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22nd, 1908, known as the Federal Employer's Liability Act, as properly construed and in adjudging the liability of the plaintiff in error by a construction of said act based upon the laws of North Carolina, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

Sixteenth. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action because the said judgment is in violation of rights granted and protection offered by the Act of Congress, approved April 22nd, 1908, known as the Federal Employers' Liability Act, for that by the terms of Section 1 of said Act, the personal representative of a deceased employee can recover damages only for the benefit of
h the legitimate next of kin, dependent upon such deceased employee, and only for the next of kin as fixed by the common law, and to permit the plaintiff to recover damages for the death of an illegitimate child for the benefit of the children of his mother born in wedlock, results in denying to plaintiff a right, privilege and immunity created by and arising under the Federal Employers' Liability Act, which has been duly and specially set up and claimed in this proceeding.

Seventeenth. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action in that the defendant has been denied a construction of the Federal Employers' Liability Act, to which it was entitled and which, if granted, would have defeated plaintiff's right to recover in this action.

Eighteenth. The Supreme Court of North Carolina, for the various reasons above set forth, committed error in rendering the final judgment it did render against the defendant in this action.

Wherefore, for these and other manifest errors appearing in the record, the Seaboard Air Line Railway prays that the judgment of the said Supreme Court of North Carolina be reversed and set aside and that judgment be rendered for the Seaboard Air Line Railway, plaintiff in error, granting it its rights under the constitution and statutes of the United States, and plaintiff in error also prays for judgment for its costs.

MURRAY ALLEN,
Attorney for Seaboard Air Line Railway.

i UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in

which a decision could be had in the said suit, between S. W. Kenney, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason, and the Seaboard Air Line Railway, a corporation, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be
j done therein to correct that error that of right, and according to laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14 day of October, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. L. BLOW,
Clerk District Court United States, Eastern District of North Carolina.

Allowed:
WALTER CLARK,
Chief Justice of Supreme Court of North Carolina.

k *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to S. W. Kenney, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason, Greeting:

You are hereby cited and admonished to be and appear at and before a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of North Carolina, wherein Seaboard Air Line Railway is plaintiff in error

and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 14th day of October, in the year of our Lord one thousand nine hundred and fourteen.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

Attest:

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

We, attorneys of record for S. W. Kenney, administrator of Beb Isaac Capehart, alias Beb Isaac Eason, defendant in error, in above entitled action, do hereby accept service of the above citation and acknowledge receipt of copy of same, together with copy of petition for writ of error, assignments of error and bond.

This 16th day of October, 1914.

WINSTON & MATTHEWS,
Attorneys for S. W. Kenney, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason, Defendant in Error.

l The Supreme Court of North Carolina.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
S. W. KENNEY, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason, Defendant in Error.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, a corporation of the State of Virginia and other States, the principal office of which is in the city of Portsmouth, in the said State, as principal, and Fidelity and Deposit Co. of Md., as surety, are held and firmly bound unto S. W. Kenney, Administrator of Beb Isaac Capehart alias Beb Isaac Eason, in the full and just sum of Two Thousand Dollars for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves, and each of our successors and assigns firmly by these presents.

Sealed with our seals, and dated this 9th day of October, in the year 1914.

Whereas lately at a hearing had before the Supreme Court of North Carolina, in a suit depending in said Court between the said S. W. Kenney, administrator of Beb Issac Capehart, alias Beb Isaac Eason, as plaintiff and Seaboard Air Line Railway, as defendant, a final Judgment was rendered against the Seaboard Air Line Railway,

and said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

Now Therefore, the condition of this obligation is such that if the said Seaboard Air Line Railway, as plaintiff in error, shall prosecute its said writ of error, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Att'y.*
FIDELITY & DEPOSIT CO. OF MD., [SEAL.]
By JOSEPH B. CHESHIRE, JR., *Att'y in Fact.*
J. L. SKINNER, *Agent.*

Bond approved and to act as supersedeas, October 14, 1914.

WALTER CLARK,
Chief Justice Supreme Court North Carolina.

1 Third District.

No. 105.

S. W. KENNEY, Adm'r,
against
SEABOARD AIR LINE RAILWAY

(From Bertie.)

Before Connor, Judge.

Defendant Appealed.

STATE OF NORTH CAROLINA,
Bertie County:

Be it remembered, that on the 11th day of February, 1913, S. W. Kenney, as administrator of B. Isaac Capehart, alias B. Isaac Eason, sued and prosecuted out of the Superior Court of Bertie County, a summons in these words:

Summons for Relief.

Bertie County, in the Superior Court.

S. W. KENNEY, Administrator of B. Isaac Capehart, alias B. Isaac Eason,
against
SEABOARD AIR LINE RAILWAY.

Summons for Relief.

STATE OF NORTH CAROLINA:

To the Sheriff of Bertie County, Greeting:

You are hereby commanded to summon Seaboard Air Line Railway, the defendant above named, if it be found within your county, to be and appear before the judge of our Superior Court, at a court to be held for the county of Bertie, at the court house in
2 Windsor, on the 8th Monday after the 1st Monday of March, next, it being the 28th day of April, 1913, and answer the complaint, which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice, that if it fail to answer the complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 11th day of February, 1913.

W. L. LYON,
Clerk Superior Court.

Return on Summons.

And on the return day of said summons, to-wit: on the 8th Monday after the 1st Monday of March, 1913, at the court house in Windsor, before the Hon. Henry P. Lane, judge, holding the Superior Court of said county, J. W. Cooper, sheriff of said county, made the following return of said summons:

"Received 13th February, 1913; served 21st February, 1913, by reading the within summons and by leaving a copy of same with H. O. Cotton, agent for the Seaboard Air Line Railway.

"J. W. COOPER,
Sheriff Bertie County."

Order Allowing Time to Plead.

And thereupon the following order is made in the said action, to-wit: "Time to Plead."

And afterwards, to-wit: On the 5th day of September, 1913, the said S. W. Kenney, Adm'r, as aforesaid, by his attorneys, Messrs. Winston & Matthews, filed the following complaint, to-wit:

3 *Complaint.*

NORTH CAROLINA,
Bertie County:

Superior Court, Spring Term, 1913.

(Title of Cause.)

The plaintiff above named, complaining of the defendant above named, for a cause of action, says and alleges:

1. That on or about the 20th day of December, 1912, Beb Isaac Capehart, then a resident of the State of North Carolina, died intestate, and the plaintiff, S. W. Kenney, was, on the 11th day of February, 1913, appointed and duly qualified as administrator of all and singular the rights and credits, goods and chattels of said Beb Isaac Capehart; such appointment and qualification being had before the Clerk of the Superior Court of Bertie County, and said Kenney, the plaintiff, is now such administrator.

2. That he is informed and believes that the death of the said Beb Isaac Capehart was caused by his being crushed by one of the wheels of a freight car of the defendant while it was being operated as a part of its freight train by the said defendant.

3. That since the first day of January, 1912, the defendant has been and is now, a duly organized corporation engaged as a railroad carrying passengers and freight for hire and operating a freight train on one of its branch lines between Boykins, Virginia, and Lewiston, North Carolina, and on the day hereafter complained of was running a freight train between said places.

4. That he is informed and believes and so avers that at the time the said Beb Isaac Capehart suffered the injury which resulted in his death he was in the employment of the defendant as a train hand and brakeman, working on the freight train of the said defendant, and was injured while in the performance of his duties as a servant of the defendant.

4 5. That he is informed and believes and so avers that the injury to the intestate of the plaintiff which caused his death resulted from the careless and negligent handling of its said freight train by defendant as follows:

On said date, about the hour of 8 o'clock P. M., the defendant ran its freight train from Lewiston, N. C., and stopped the same on its main track at Kelford, N. C., a station on its road; that its freight conductor and other servants in charge of said train undertook to take a box or freight car from its switch at Kelford and attach said car to its freight train as a part thereof; that the engine was uncoupled and disconnected from its train of cars, which were left standing on the main track; that the car to be "set out" was the last

of four or five cars standing on the switch; that to get out said car it was necessary to take all of the cars from the switch, carry them on the main line, then uncouple and disconnect the last or hindermost car and then place the other cars again on the switch when the engine would come out on the main line, back down to the train of cars and be ready to go forward; that in furtherance of this plan the engine was uncoupled and disconnected from the freight train and went forward beyond the switch; that the switch was then set and the engine backed in the switch and coupled on to the four or five cars there being; that the engine then drew said cars forward and carried them to the main track; that the switch was again set and instead of slowly and carefully backing said engine and cars down to its said train of cars, as its duty required it to do, the defendant negligently and carelessly uncoupled said hindermost car from the cars then attached to the engine and in order to give it sufficient momentum to go back on the main line to the freight train, the engineer in charge, carelessly and negligently made what is called a "flying shift," or caused his engine and cars to "kick" the detached car and send it rapidly and without control toward the train of cars; that the intestate of the plaintiff was then on the top of the said hindermost freight car, standing by his brake wheel, where his duty called him to be; that as a result of said "flying shift" and "kick," so carelessly and negligently made, the said hindermost car struck the train of freight cars with great violence, and by reason of the same the intestate of the plaintiff was violently thrown from his place on said car and fell to the track, and his feet, leg and body caught under the wheel of said car and bruised, broken and mangled, to such a degree that it was advisable to carry him to a hospital, where he died from the said wounds in a very short time.

6. That he is informed and believes and so avers that the defendant owed the intestate of the plaintiff in taking out said car and setting it in its train, the duty of doing so with due care, and that it failed to exercise that due care under the circumstance that was required of it, and that it was specially careless and negligent in using the method of the "flying switch and kick," and in the way in which it rapidly and violently threw the said car back upon its train, thereby causing the injury complained of.

7. That he is informed and believes and so avers that the death of the plaintiff's intestate was directly caused and brought about by the negligence and carelessness of the defendant and by its wrongful act in the careless handling of its engine and cars as aforesaid.

8. That he is informed and believes and so avers that at the time of said injury causing his death, the intestate of the plaintiff was 19 years of age, in good health and fine physical condition, and that his expectancy of life was then 42.9 years; that he was earning the sum of $50 per month and had prospects of steady promotion with increased pay.

9. That he is informed and believes, and so avers, that as a direct result of the negligent, careless, and wrongful act and conduct of the defendant causing the death of the intestate of the plaintiff as

alleged, the plaintiff, as administrator of deceased, is entitled to recover of the defendant the sum of seven thousand and five hundred dollars, which he demands.

6 Wherefore, plaintiff demands judgment for the sum of seven thousand and five hundred dollars, and for all other and further relief to which he may be entitled, and for costs of action.

WINSTON & MATTHEWS,
Attorneys for Plaintiff.

S. W. Kenney maketh oath that as administrator of Beb Isaac Capehart, he is the plaintiff in the above-entitled action, and that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to them he believes it to be true.

S. W. KENNEY.

Sworn to and subscribed and filed before me this the 6th day of September, 1913.

A. C. MITCHELL, *J. P.*

Order Allowing Time to File Answer.

And afterward, to-wit: On the first Monday after the 1st Monday in September, 1913, at a regular term of said court, begun and held for said county, at the court house in Windsor, his Honor, Robert B. Peebles, the judge assigned by law, present and presiding, the said action is called, and the following order made therein to-wit: "Forty days allowed to file answer as of this term."

And afterward, to-wit: On the 10th day of October, 1913, the said Seaboard Air Line Railway, by its attorneys, J. B. Martin and Murray Allen, esquires, filed the following answer:

7 *Answer.*

NORTH CAROLINA,
Bertie County:

Superior Court, Spring Term, 1913.

(Title of Cause.)

The defendant, answering the complaint herein, says:

1. The defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of Section 1 of the complaint, and therefore denies same.

2. The defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of Section 2 of the complaint, and therefore denies same.

3. The allegations of section 3 are admitted.

4. The defendant admits that plaintiff's intestate at the time of his death was in the employment of defendant as a train hand, and was working on defendant's train, which was being operated between Boykins, Va., and Lewiston, N. C., and which at the time of the death of said plaintiff's intestate was engaged in interstate commerce.

5. The allegations of section 5 are not true and are denied.

6. The allegations of section 6 are not true and are denied.

7. The allegations of section 7 are not true and are denied.

8. The allegations of section 8 are not true and are denied.

9. The allegations of section 9 are not true and are denied.

And for a further defense, the defendant says:

1. That if plaintiff's intestate was killed as alleged in complaint, which is again denied, his death occurred while the defendant as a common carrier was engaging in commerce between the States of Virginia and North Carolina and other States, and while the said intestate was employed by the defendant in such interstate commerce, and the plaintiff's right to recover in this action, and the defenses available to the defendant are to be determined by the provisions of the act of Congress of the United States, approved April 22, 1908, c. 149, 35 stat. 65, and the amendments thereof
8 and known as the Federal Employers' Liability Act, and the defendant pleads and relies upon the provision of said act and claims each and every right, privilege, and immunity created by or contained in said act.

2. The defendant alleges as a defense to said action that the plaintiff's intestate was an illegitimate child, and at his death left no surviving wife or children, and left no surviving parents, or next of kin dependent upon him, and the said intestate left no one surviving him for whose benefit a recovery can be had in this action, as provided by section 1 of the said act of Congress, and the defendant relies upon and claims the benefit of said section 1 of said act of Congress as a bar to the plaintiff's right to recover.

3. That if the death of plaintiff's intestate was caused by the negligence of defendant, as alleged in the complaint, which is again denied, plaintiff's intestate by his own negligence contributed to his injury in that he failed to pay attention to his surroundings, and failed to exercise the care of a prudent man under the circumstances, and the contributory negligence of the said intestate is pleaded as a defense to plaintiff's right to recover in this action.

4. That if the death of plaintiff's intestate was brought about as alleged in the complaint, which is again denied, the risk of injury from such cause was open and obvious and fully known to said intestate, and he assumed the risk of injury, and the assumption of risk by plaintiff's intestate is pleaded by the defendant in bar of plaintiff's right to recover in this action.

5. That if plaintiff's intestate was killed as alleged in the complaint, while defendant's train was engaged in making a "flying switch," which is denied, it was one of the ordinary risks of his employment, which he assumed, and his assumption of risk in that respect is pleaded by the defendant in bar of plaintiff's right to recover in this action.

Wherefore, the defendant demands judgment that it go
9 without day and that it recover of the plaintiff the costs of this action.

J. B. MARTIN,
MURRAY ALLEN,
Attorneys for Defendant.

NORTH CAROLINA,
Wake County:

J. F. Mitchell, being duly sworn, says that he is agent for the defendant company at Raleigh, N. C.; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on information and belief, and as to them he believes it to be true.

J. F. MITCHELL.

Sworn to and subscribed before me this 25th day of September, 1913.

[SEAL.] C. T. McDONALD,
Notary Public.

My commission expires 1st day of February, 1914.

First Jury Trial, Issues, Answers, etc.

And thereafter, at a regular term of the Superior Court of Bertie County, begun and held on the 10th Monday after the 1st Monday in September, 1913, at the court house in Windsor, with Hon. Robert B. Peebles, the judge assigned by law, presiding, the following proceedings were had:

Thereupon, this cause coming on for trial, the jury for their verdict found the issues submitted to them as follows:

1. Was the death of plaintiff's intestate caused by the negligent and wrongful act of the defendant company, as alleged in the complaint?

Answer. "Yes."

2. If said death was so caused, what sum by way of damages is plaintiff entitled to recover of the defendant by reason thereof?

Answer. "Twelve hundred and fifty dollars."

10 3. Did plaintiff's intestate, by his own negligence, contribute to his death?

Answer. "No."

4. Did plaintiff's intestate voluntarily assume the risk of injury as alleged in the answer?

Answer. "No."

There was a motion, by the defendant, to set aside the verdict as excessive, and for a new trial. The court being of the opinion that same was excessive, by consent of plaintiff, reduces same to $1,000, and overrules the defendant's motion. There was a motion by the defendant for a new trial and a venire de novo. The motion was refused, and the Court entered judgment upon the verdict for the sum of $1,000.00.

Upon appeal to the Supreme Court from this judgment, a new trial was ordered upon the issues of contributory negligence and damages, and the plaintiff was permitted to amend his complaint so as to allege the existence of beneficiaries, and the defendant was permitted to traverse the allegations of said amendment.

Whereupon on April 16, 1914, plaintiff filed the following amendment to his complaint:

Amendment to Complaint.

NORTH CAROLINA,
Bertie County:

Superior Court, April Term, 1914.

(Title of Cause.)

By leave of the Court, the plaintiff in the above-entitled cause, amends his complaint as follows:

1. Add to paragraph 1 of the complaint the following:

"And that Beb Isaac Capehart died as aforesaid, leaving no wife nor children, never having married; that both his mother and father died some years ago and before the death of the said Beb Isaac Capehart; that at the time of his death the said Beb Isaac Capehart had two brothers and one sister whose names are Sills Hardy, Joe Hardy, and Nettie Hardy, and who were and are his next of kin; and that the said brothers and sister were the next of kin dependent upon him for support, and they were dependent upon him for their support, all being of too immature an age to earn a living, and this action is brought by plaintiff administrator in behalf of the said infants next of kin so dependent."

11

2. Add to paragraph 9 of the complaint the following:

"For the use and benefit of the infant brothers and sister, herein above named as next of kin of Beb Isaac Capehart who were dependent upon him for support, to compensate them for the pecuniary loss they have sustained and will sustain by reason of the death of the said Beb Isaac Capehart as alleged herein."

WINSTON & MATTHEWS,
Attorneys for Plaintiff.

S. W. Kenney maketh oath that as administrator of Beb Isaac Capehart he is the plaintiff in the above-entitled action and that the foregoing amendments to the complaint in this cause are true of his own knowledge except as to those matters stated therein on information and belief, and as to them he believes them to be true.

S. W. KENNEY.

Sworn to and subscribed and filed before me this the — day of April, 1914.

C. F. LYON,
Deputy Clerk, Superior Court.

And the defendant on April 24th, 1914, filed the following answer to the said amendment:

Answer.

NORTH CAROLINA,
Bertie County:

Superior Court, April Term, 1914.

(Title of Cause.)

The defendant answering the amendments to the complaint, says:

12 1. The allegations of the first paragraph are not true and are denied.

2. The allegations of the second paragraph are not true and are denied.

J. B. MARTIN,
MURRAY ALLEN,
Attorneys for Defendant.

NORTH CAROLINA,
Wake County:

L. M. Calvert, being duly sworn, says: That he is agent for the defendant, Seaboard Air Line Railway at Raleigh, N. C., that the foregoing answer to the amendments to the complaint in this case are true of his own knowledge, except as to the matters stated therein on information and belief, and as to them he believes it to be true.

L. M. CALVERT.

Sworn to and subscribed before me this 22nd day of April, 1914.
[SEAL.] C. A. GOSNEY,
Notary Public.

My commission expires 29th day of January, 1916.

Second Jury Trial.

And thereafter, at a regular term of the Superior Court of Bertie County, begun and held on the 8th Monday after the 1st Monday in March, 1914, at the court house in Windsor, N. C., with Hon. Geo. W. Connor, the judge assigned by law, presiding, the following proceedings were had:

Thereupon this cause coming on for trial the following jurors, to-wit:

E. Z. Daniel, G. L. Perry, J. R. White, Joe Spivey, A. V. Harrell, J. F. Whedbee, W. H. Harrell, Jr., C. C. Hughes, Herbert Harrell, M. E. Mizell, David Morris, and W. R. Hughes, were chosen, tried sworn, and empaneled to try the issues joined between the parties; and thereupon, after the charge of the court, said jurors for their verdict, found the issues submitted as follows:

13 *Issues.*

NORTH CAROLINA,
Bertie County:

In Superior Court, May Term, 1914.

(Title of Cause.)

1. Are Sills Hardy, Joe Hardy, and Nettie Hardy next of kin of the intestate, Beb Issac Capehart, alias Beb Isaac Eason, as alleged in the complaint?

Answer. "Yes."

2. If so, were the said Sills Hardy, Joe Hardy, and Nettie Hardy dependent upon said intestate, Beb Isaac Capehart?

Answer. "Yes."

3. What sum, if any, is plaintiff entitled to recover of the defendant, as damages?

Answer. "$800.00."

Motion by defendant for judgment non obstanti ver-dicto. Overruled. Defendant excepts.

Motion by defendant to set the verdict aside. Motion refused. Defendant excepts. Motion for new trial for errors committed during the trial. Motion refused. Defendant excepts.

The court signs the following judgment:

Judgment.

NORTH CAROLINA,
Bertie County:

Superior Court, May Term, 1914.

(Title of Cause.)

Present, Hon. Geo. W. Connor, Judge.

This cause comes on for trial before his Honor, Geo. W. Connor, and a jury, and the jury having responded to the issues as they appear of record as follows:

14 First. Are Sills Hardy, Joe Hardy and Nettie Hardy next of kin of the intestate Beb Isaac Capehart, alias Bebe Isaac Eason, as alleged in the complaint?

Answer. "Yes."

Second. If so, were the said Sills Hardy, Joe Hardy, and Nettie Hardy dependent upon said intestate Beb Isaac Capehart?

Answer. "Yes."

Third. What sum, if any, is the plaintiff entitled to recover of defendant as damages?

Answer. "$800.00."

It is now, on motion of Winston & Matthews, attorneys for the

plaintiff, considered and adjudged that S. W. Kenney, Admr. of Beb Isaac Capehart, alias Beb Isaac Eason, recover of the defendant of record, the sum of eight hundred dollars and the costs of this action to be taxed by the Clerk of this court.

GEO. W. CONNOR,
Judge Presiding.

To the foregoing judgment defendant excepts and appeals therefrom to the Supreme Court. Notice of appeal given in open court. Further notice waived. Undertaking on appeal fixed in the sum of $50.00. By consent defendant to have 60 days to file and serve statement of case on appeal, and plaintiff allowed 30 days thereafter to serve counter statement or exceptions.

The defendant filed the following appeal bond:

Appeal Bond.

NORTH CAROLINA,
Bertie County:

In Superior Court, May Term, 1914.

(Title of Cause.)

Whereas, at May Term, 1914, of the Superior Court of Bertie County, the plaintiff recovered judgment against the defendant for $800.00 and the costs of this action; and,

15 Whereas, the defendant intends to appeal from said judgment to the Supreme Court;

Now, therefore, we, Seaboard Air Line Railway and Fidelity and Deposit Company of Maryland, undertake, pursuant to the statute, in the sum of $50.00, to pay all costs which may be awarded against said defendant on said appeal.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By JOSEPH B. CHESHIRE, JR., *Att'y-in-Fact,*
By J. L. SKINNER, *Agent.*

Filed May 26, 1914.
W. L. LYON, *C. S. C.*

Statement of Case on Appeal by Defendant, Appellant.

NORTH CAROLINA,
Bertie County:

In Superior Court, May Term, 1914.

(Title of Cause.)

This was civil action for damages brought by the plaintiff to recover damages for the death of his intestate, alleged to have been

caused by the negligence of the defendant while the said intestate was employed by the defendant as a brakeman on one of its freight trains, being operated between Lewiston, N. C., and Boykins, Va.

The action was tried under the act of Congress of the United States, approved April 22, 1908, and the amendments thereof, known as the Federal Employers' Liability Act.

The action was first tried at November Term, 1913, of Bertie County Superior Court, before his Honor, R. B. Peebles, judge, and a jury. The cause of action and the contentions of the parties are shown by the pleadings which are set forth in full in the record. The issues and the answers thereto, made by the jury, appear in the record.

16 Upon appeal by defendant from the judgment rendered at the first trial, the Supreme Court ordered a new trial upon the issues of contributory negligence and damages, and permitted an amendment to complaint alleging the existence of beneficiaries, and permitted defendant to file answer traversing such allegations.

This action came on for trial again at May Term, 1914, of the Superior Court of Bertie County, his Honor, Geo. W. Connor, judge, presiding, and was tried upon the complaint and answer as amended, and issues were submitted to the jury and answered as follows:

1. Are Sills Hardy, Joe Hardy, and Nettie Hardy next of kin of the intestate, Beb Isaac Capehart, alias Beb Isaac Eason, as alleged in the complaint?

Answer. "Yes."

2. If so, were the said Sills Hardy, Joe Hardy, and Nettie Hardy dependent upon said intestate, Beb Isaac Capehart?

Answer. "Yes."

3. What sum, if any, is plaintiff entitled to recover of the defendant, as damages?

Answer. "$800.00."

It was admitted by the counsel of the plaintiff and defendant that at the time of the death of plaintiff's intestate, the defendant was engaging in interstate commerce; that defendant's train was being operated between Lewiston, N. C., and Boykins, Va., and was transporting interstate commerce, and that the plaintiff's intestate was employed by the company, and was killed by the train while employed on that train on the particular occasion when the defendant was running it and while he was employed by defendant in such commerce.

It was also admitted that plaintiff's intestate was an illegitimate child of Emaline Capehart, who, after the birth of said intestate, married Joe Hardy, and that the children named in the complaint as beneficiaries, are the children of Emaline Capehart by her said husband.

17 And the defendant admitted that when the plaintiff's intestate worked for the defendant he was paid $1.32 for each day's work, and that he was being paid that sum per day when he was killed.

Plaintiff's Evidence.

Plaintiff offered the following evidence:

IDA LAWRENCE testified as follows:

Wife of Jim Lawrence; aunt of Capehart. His mother was Emaline Hardy. She and husband dead. Her oldest child is Beb Isaac Hardy, alias Capehart. Emaline has three living children: Sills Hardy, Joe and Nettie Hardy. Sills is about 8 or 9 years old. Joe is about 7, and Nettie 6. All live with me. Have been with me 6 years. Mother gave them to me. Beb Isaac worked and turned over wages to me for children.

Cross-examination:

Beb named Isaac Hardy. He was born before sister married Hardy. Sills first child born after marriage. Emaline not married when Beb Isaac was born. First husband was Hardy. Don't know who Beb's father was. He was born before she was married. I took children to take care of them. Beb stayed with me one year and six months. Went away from me. Stayed in Bertie until he went to Boykins. Came home twice and stayed two or three days. He brought me money for children. He brought about $3 one time, also cloth for suit of clothes for each child. Every time he came he brought money and clothes for children. Children got biggest part of what he made. He turned it over to me, but I don't know how much. I have the children and take care of them just as I did before Beb died.

18 Redirect:

After leaving my house he worked around Roxobel, six or seven miles from my house. After he went to Boykins, he would come home and bring something for children. He worked on train.

JAMES LAWRENCE testified:

Husband of Ida. Beb helped to take care of brothers and sisters. He had been gone six years. When he worked for Mr. Purvis his wages paid me for children. Towards last he gave us more than he did at first. He was working for railroad. I saw him once on train. He spoke to me. It was not mail train. No one helped support children except Beb Isaac.

Cross-examination:

Beb did not work for me. He worked for Mr. Purvis. I did not charge board. He did not run away. Went to Roxobel. David Eason was his grandfather. He stayed with Charlie Eason. He called W. C. Eason's people his folks. He gave me $2.50 once for children. $2.00 once. This while at Boykin. He also sent money—$1.50. Along every month I got something for children. I gave money to children. I bought clothes for children.

W. J. PURVIS testified:

I live six miles from Roxobel. I knew deceased. I remember when his mother died and he went to Lawrence. I gave wages to Jim to take care of children. He was average boy. He was about 15 years old.

Cross-examination:

I paid him $12.50 per month and board. One and a half years—farm hand. He had left me three or four years before death.
19 He worked at Roxobel. Don't know with whom. I saw him on freight train three or four times after he left Roxobel. I saw him as often as three times in one year. I do not live on railroad. He clothed himself out of wages when he worked with me. I turned over wages to Jim. Cost about $6.00 per month to clothe him. I gave rations and his uncle did cooking for him. Worth $3.00. Cost of living about $9.00 per month. Never saw him use tobacco or whiskey.

Plaintiff offers first issue and answer to same on former trial. Objection; sustained; exception by plaintiff.

Plaintiff offers opinion of Supreme Court in this case, reported in South Eastern; defendant objects; sustained; exception by plaintiff.

Plaintiff rests.

Motion by defendant to dismiss action and for judgment of non suit, for that upon plaintiff's evidence he is not entitled to recover under the Federal Employers' Liability Act. Motion overruled; defendant excepts.

Exception No. 1.

Defendant offers the following evidence:

Defendant's Evidence.

BUCK CAPELLE testified:

Engineer S. A. L. since 1902. Lived in Boykin since 1898. Knew deceased. Known as "Plug." When he first came to Boykin he stayed with Capt. Smith, around the house. Smith left. He came then to my house in 1911. He stayed around house. Washed buggies. No special wages. I fed him; gave him money for cigarettes. He was brakeman on train when killed. Supplying place. He would work not over three days a month; some months not at all. He probably made, running for Seaboard and shining shoes, etc., not over $4.50 per month.

20 Cross-examination:

I run mail train. That day was running freight train. I passed freight train twice daily. I fed him. Gave him clothes; some money, and in addition he would make about $4.50 per month. Brakeman's place on top of train. Don't know where he was when killed.

C. C. SMITH testified:

Live now in Norlina. Employed as freight conductor by S. A. L.; formerly lived at Boykin. Deceased went from Bertie to Boykin; worked for me; cut wood, cleaned up yard; did errands. With me one year. I paid him no wages; fed him and gave him money Saturday night. Shined my shoes. He would pick up 75 cents a week. He did not run at all as brakeman at that time. We had two brakemen on my train. I had extra brakeman some times. As a rule have extra brakeman. When do not, pick up any man we can get.

Cross-examination:

Train usually consisted of 45 cars; two brakemen.

Redirect:

Deceased was not extra brakeman.

JOHN SHARP testified.

Live in Boykin. Brakeman for S. A. L. seven or eight years. Regular brakeman. Other brakeman off when deceased was killed. He was not regular brakeman. I knew him to make two or three trips while I was there. Ran when we could get no one else. I never saw him doing any regular work. Saw him doing errands for Mr. Capelle or merchants.

Cross-examination:

He was braking when killed. He had made trips for me. Have seen him hanging around engines at night.

21 W. O. JOEL testified:

Live in Richmond. Chief clerk in superintendent's office, S. A. L. Pay rolls made up for 1912 for Boykin Branch by me. Records cover year 1912. Employees are paid from pay rolls.

Q. What amount was paid deceased during year 1912?

Witness says that he cannot answer except from records.

Look at records and answer above question.

A. $13.98. His name appears on pay rolls during six separate months. That was the only way S. A. L. paid off hands. This was only amount paid him during year, of my knowledge.

The defendant then put in evidence the records identified by witness showing the time worked by plaintiff's intestate.

Cross-examination:

Record shows that deceased worked one day 24 cents overtime, and same as to other days.

And on the following days the following amounts were paid for over-time work: On January 3rd, 1912, twenty-four cents; on February 17th, 1912, twelve cents; on March 4th, 1912, twelve cents; on July 30th, 1912, twelve cents; on October 2nd, 1912, twenty-six cents; on December 14th, 1912, one dollar and forty-eight cents, and on December 16th, 1912, the day of the accident, he made five hours over-time for which he has not been paid.

B. F. TAYLOR testified:
Lived in Boykin three years. Policeman. Knew deceased. Never knew him to have job. No regular employment. Don't think he made anything.

22 H. B. SIMMONS testified:
Lived in Boykin five years. Salesman. Knew deceased. Had no regular job. $4.00 maximum of amount earned by him. Was not thrifty. He worked just enough to get living.

F. L. HARRIS testified:
Lived in Boykin 11 years. Knew deceased five months. Peddled around for living. $3.00 or $4.00 per month.

B. E. PHELPS testified:
Deputy sheriff at Boykins. Knew deceased. Not thrifty. No regular employment. Knocked around town. Average income $3.00 or $4.00 per month.

W. P. EDWARDS testified:
Mayor of Boykins. Knew "Plug." Never knew him to do anything except cut wood, etc., $3.00 or $4.00 per month.

Mr. JOEL, recalled:
Capehart worked overtime and got extra pay for it. It appears on time slips.
These slips show that he worked eleven hours and five minutes on January 3rd, 1912; nine hours and fifteen minutes on February 17th, 1912; ten hours and forty-five minutes on March 4th, 1912; ten hours and fifty minutes on July 30th, 1912; eleven hours and fifty-five minutes on October 2nd, 1912; twenty hours and thirty minutes on December 14th, 1912; eight hours and forty-five minutes on December 15th, 1912; and thirteen hours and forty-five minutes, up to the time of the accident, on December 16th, 1912, the day of the accident. The slip of December 16th, 1912, the day of the accident, shows that he went on duty at 7.00 A. M., and that his leg was cut off at 8.45 P. M.

23 W. C. EASON testified:
Live in Roxobel. 38 years old. I took care of deceased while at Roxobel. He went to Boykins. Would come to Roxobel and spend time with me. I am supposed to be his father. He called me father.

Cross-examination.

Not married to boy's mother. I offered to take boy in my family as one of my children. He refused to live with me.

HENRY BUSH testified:
Live in Roxobel; knew deceased. Deceased would not go to see brothers and sister. Said he could not do anything for them.

Deposition of Whit Walden.

The defendant offered the deposition of Whit Walden (colored), who testified that he lived at Boykins, Va., and knew Beb Isaac Capehart; that he never knew him to do any kind of work; that sometimes he would get on the train and go to Lewiston and back; that he had no regular employment, and did odd jobs for the railroad or anybody else that wanted him; that it did not look like he would make more than a dollar or two a month; that $3.00 or $4.00 a month was all he was worth.

Deposition of W. Hugh Powell.

The defendant offered the deposition of W. Hugh Powell, a merchant at Boykins, Va., who testified that Beb Isaac Capehart, the intestate, did no regular work at Boykins; that he knew him about two years; that he did not do any kind of work.

24 Upon objection by plaintiff, the following evidence appearing in the deposition of this witness was excluded:

Q. Then how did he live?
A. Well, he lived on we merchants around here. He lived on us for one.

To the exclusion of this evidence defendant objected. Objection overruled, and defendant excepts.
Exception No. 2.

This witness was further asked:

Q. In what way do you mean?
A. Bought stuff and did not pay for it.

Upon objection by plaintiff this evidence was excluded, and defendant objected to such exclusion and excepted.
Exception No. 3.

This witness was further asked:

Q. How was he generally regarded here?
A. He was regarded as being kind of a worthless darkey, I reckon. He was in my estimation.

Upon objection by plaintiff this evidence was excluded, and defendant objected to such exclusion, and excepted.
Exception No. 4.

Deposition of W. A. Powell.

The defendant offered the deposition of W. A. Powell, a merchant of Boykins, Va., who testified that he knew Beb Isaac Capehart about two years; that he had no occupation in Boykins. This witness was asked:

Q. How was he regarded by the people?

A. Almost as nobody. He was not regarded as anything but a nuisance and in the way. I have ordered him out of the store more than once because he was sitting around in the way, and doing nothing.

25 Upon objection by plaintiff this evidence was excluded, and to such exclusion defendant objected and excepted.

Exception No. 5.

Deposition of B. F. Britt.

The defendant offered the deposition of B. F. Britt, a merchant of Boykins, Va., who testified that he knew plaintiff's intestate, Beb Isaac Capehart; that they called him "Plug" around Boykins; that he was not regularly employed; that he just picked up a little work around; he sometimes worked for the railroad as a helper; he never had any regular job.

This witness was asked:

Q. Was he looked upon as an industrious, thrifty negro?

A. No, sir.

Upon objection by plaintiff this evidence was excluded, and to such exclusion defendant objected and excepted.

Exception No. 6.

Defendant rests.

The defendant introduced without objection the following evidence in depositions of witnesses at Boykins, Va., to-wit:

WHIT WALDEN:

They mostly called him "Plug." I don't know amount of money he made on an average during a month; it looked to me like he would make a dollar or two. I don't know as he made any. Three or four dollars a month was all he was worth.

W. HUGH POWELL:

He didn't do anything in the way of work. I never saw him do anything.

26 W. A. POWELL:

I think he went by the name of Plug altogether.

H. B. SIMMONS:

He was commonly known as Plug; was not looked upon as a useful and industrious negro. Was not generally regarded in this community as much. They generally called him Plug Ugly.

F. L. HARRIS:

Had no regular occupation that I knew of. Kind of a dead-beat appeared to me. Was generally regarded as almost a worthless char-

acter. That is the way I would represent him. Don't know how he got what he ate; did not see enough of him to tell. It was generally understood that he hung around where they would let him and did little odd work for his food. I never knew of him doing any particular work anyway.

J. F. MURRELL:

I never saw that negro do any work. I do not know as I ever saw him have any little job of any kind. I do not really know how he got his living anyway. He certainly did not seem to work for it.

R. C. KNIGHT:

I do not know how he was regarded. Kind of about half-tramp.

B. F. TAYLOR:

I should not call him a very industrious and thrifty negro. Do not think he had any regular work. I never heard of any. I don't know how people looked on him, but I do know how he was
27 looked on by me. I did not think he was much. Mighty common boy; trifling. I saw him often. He was not any good. The Seaboard Agent tried to get me as town sergeant to run him away from here several times because he was staying around there and was not any good.

E. R. BRYANT:

He generally lived around here. I saw him hanging around Buck Capell's most of the time. Was looked upon generally by people here as kind of loafing boy. I cannot say he was looked upon as a useful colored citizen. I just looked upon him as kind of a hanger 'round.

Defendant rests.

Plaintiff offers the following evidence:

Ed. SAVAGE testified:
That he saw Capehart on night he was killed; that he last saw him on top of the car.

Plaintiff rests; defendant rests.

Defendant renews motion to dismiss action and for judgment of non suit. Motion overruled and defendant excepts.
Exception No. 7.
Defendant, in apt time and in writing, requested the court to instruct the jury as follows:

Defendant's Request for Instructions.

NORTH CAROLINA,
Bertie County:

In the Superior Court.

(Title of Cause.)

The defendant requested the court to instruct the jury as follows:

28 1. If you believe the evidence you will answer the first issue "No," and the second issue "No," and the third issue "Nothing."

The Court refused to give this instruction and defendant excepts. Exception No. 8.

2. The defendant requests the court to direct a verdict in its favor on the ground that the right of plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, and the evidence shows that the plaintiff's intestate did not leave surviving any next of kin dependent upon him.

The Court refused to give this instruction and defendant excepts. Exception No. 9.

3. The Court charges you that the burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence that his intestate, Beb Isaac Eason, or Beb Isaac Capehart, left surviving next of kin dependent upon him, and unless you are so satisfied you will answer the issue of damages "Nothing."

And which charge the Court gave in the exact langauge of the request.

4. The Court charges you that unless you find by the preponderance of the evidence, the burden of proof being upon the plaintiff, that Beb Isaac Eason, or Beb Isaac Capehart was born in lawful wedlock, you will answer the issue of damages "Nothing."

The Court refused to give this instruction, and defendant excepts. Exception No. 10.

29 5. The Court charges you that of you find from the evidence that plaintiff's intestate, Beb Isaac Eason, or Beb Isaac Capehart, was the son of W. C. Eason and that W. C. Eason was not the lawful husband of Emaline Capehart, you will answer the issue of damages "Nothing."

The Court refused to give this instruction and defendant excepts. Exception No. 11.

6. The measure of damages in this case is not the measure of damages obtaining under the State practice, to-wit: The pecuniary value of the life of the intestate, during its prospective continuance.

7. The measure of damages must be determined according to the provisions of the Federal Employers' Liability Act, and if you find that plaintiff's intestate left surviving next of kin dependent upon him, the measure of damages is the loss in money caused them by

reason of the death of the intestate. It is purely and entirely a money or financial loss. How much money have the next of kin been deprived of by the death of Beb Isaac Capehart, or Beb Isaac Eason, computing the same at its present worth or value? It is not a question of how much he would have made for himself, for his own use had he lived out his allotted time, but the present value of the sum his next of kin might reasonably have expected to receive from his earnings during his expected life.

8. The jury must not undertake to give the equivalent of the value of human life. You will allow nothing for suffering or sorrow. You must not attempt to punish the railway company. It is just a matter of dollars and cents.

All of which three requests the Court gave in the exact language of the defendant's counsel, as above stated.

9. The Court instructs you that by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, the plaintiff's right to recover in this action is dependent
30 upon Beb Isaac Capehart, or Beb Isaac Eason, plaintiff's intestate having left surviving him next of kin dependent upon him, and the Court instructs you that it appearing from plaintiff's evidence, that plaintiff's intestate was an illegitimate child, the parties named in the complaint for whose benefit this action is brought, are not plaintiff's intestate's next of kin and you will answer the first issue "No."

The Court refused to give this instruction and defendant excepts. Exception No. 12.

JAMES B. MARTIN,
MURRAY ALLEN,
Attorneys for Defendant.

Judge's Charge.

The Court instructed the jury as follows:

It is the law that where an employee of a common carrier, engaged in interstate commerce, is killed, while in the performance of his duties, and his death is caused by the negligence of any of the officers, agents or employees of such carrier, the personal representative of such deceased employee may recover of the common carrier, for the benefit of the next of kin, dependent upon such employee, such sum as the jury shall award as damages, such sum being arrived at from the facts found by the jury from the evidence, and in accordance with the rules of law given the jury by the Court.

It is admitted, in this case, that the plaintiff, S. W. Kenney, is the personal representative of Beb Isaac Capehart; that Beb Isaac Capehart is dead, and at the time of his death was an employee of the defendant, and was in the discharge of his duties; that the defendant is a common carrier, engaged in interstate commerce.

Upon a former trial of this action an issue was submitted to a jury, and answered as follows:
31 "Was the death of plaintiff's intestate caused by the negligent and wrongful act of the defendant company, as alleged in the complaint?

"Answer. 'Yes.'"

The first issue now submitted to you is as follows:

"Are Sills Hardy, Joe Hardy, and Nettie Hardy next of kin of the intestate, Beb Isaac Capehart, alias Beb Isaac Eason, as alleged in the complaint?"

[If the jury shall find from the evidence that Beb Isaac Capehart, Sills Hardy, Joe Hardy and Nettie Hardy, were all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy, and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead, that Beb Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue "Yes."]

To the foregoing charge in brackets, defendant excepts.

Exception No. 13.

The next issue submitted to you is:

"If so, were the said Sills Hardy, Joe Hardy, and Nettie Hardy dependent upon said intestate?"

The burden of this issue is upon the plaintiff; that is, unless the jury is satisfied by the greater weight of the evidence that Sills Hardy, Joe Hardy and Nettie Hardy were dependent upon Beb Isaac Capehart, you will answer this issue "No;" if, however, you are so satisfied by the evidence, you will answer the issue "Yes."

[It is not necessary for the jury to find that these children were solely and absolutely dependent upon Beb Isaac Capehart for their support and maintenance, in order that this issue should be answered "Yes." If the jury shall find, by the greater weight of the evidence that these children are the brothers and sister of Beb Isaac
32 Capehart; that Beb Isaac was the oldest child of his mother, and recognized his relationship to the children, and had assumed the duty of aiding in the support and maintenance of these children and did, according to his ability, aid the aunt and uncle of the children in supporting and maintaining the said children by contributing money and clothing for them, then the jury should answer the issue "Yes."]

To the foregoing charge in brackets, defendant excepts.

Exception No. 14.

[If the jury shall find that Beb Isaac Capehart was the illegitimate child of his mother, that some years after his birth his mother married and had the children born to her, as issue of said marriage; that thereafter Beb Isaac Capehart left the home in which the children were living and went to the home of his reputed father and lived with him as a member of his family, separating himself from his half brothers and sister, and refusing to recognize any relation to them; that thereafter he left his reputed father's home and went to Boykins, Va., where he lived until his death, making no contribution for the support and maintenance of the children, and that in the meantime the children remained with their aunt and uncle, not looking to or receiving [support] from Beb Isaac Capehart, then you should answer this issue "No," although you may

find that on two or three occasions, out of charity or good will he contributed small sums to the aid of the children.]

To the foregoing charge in brackets, defendant excepts.

Exception No. 15.

The third issue is as follows:

"What sum, if any, is plaintiff entitled to recover of defendant as damages?"

The Court charges you that the burden of proof is upon
33 the plaintiff to satisfy you by the greater weight of the evidence that his intestate, Beb Isaac Eason, or Beb Isaac Capehart left surviving next of kin dependent upon him, and unless you are so satisfied you will answer the issue of damages "Nothing." The measure of damages in this case is not the measure of damages obtaining under the State practice, to-wit: The pecuniary value of the life of the intestate during its prospective continuance. The measure of damages must be determined according to the provisions of the Federal Employers' Liability Act, and if you find that plaintiff's intestate left surviving next of kin dependent upon him, the measure of damages is the loss in money caused them by reason of the death of the intestate. It is purely and entirely a money or financial loss. How much money have the next of kin been deprived of by the death of Beb Isaac Capehart or Beb Isaac Eason, computing the same at its present worth or value? It is not a question of how much he would have made for himself for his own use had he lived out his allotted time, but the present value of the sum his next of kin might reasonably have expected to receive from his earnings during his expected life. The jury must not undertake to give the equivalent of the value of human life. You will allow nothing for suffering or sorrow. You must not attempt to punish the railway company. It is just a matter of dollars and cents.

You may take the case and render your verdict.

The jury for their verdict answered the issues as set forth in the record. the first issue "Yes," the second issue "Yes," and the third issue, "$800.00."

Defendant moved for judgment non obstanti veredicto. Motion overruled; defendant excepts.

Exception No. 16.

Defendant moved for new trial for errors occurring during the trial in the exclusion of evidence. in the refusal to dismiss
34 the action, in the refusal to give defendant's requests for instructions, and in the charge as given. Motion overruled, and defendant excepts.

Exception No. 17.

The defendant moved to set the verdict aside. Motion overruled; defendant excepts.

Exception No. 18.

The Court signed judgment as appears in the record. Defendant excepts.

Exception No. 19.

The defendant, in open court, appeals to the Supreme Court.

Notice of appeal waived. Appeal bond fixed at $50. Defendant allowed 60 days to prepare and serve case on appeal. Plaintiff allowed 30 days thereafter to serve counter case or exceptions.

Assignments of Error and Exceptions Grouped.

The defendant groups its exceptions and assigns error as follows:

1. For that at the conclusion of plaintiff's evidence the Court refused defendant's motion to dismiss the action and for judgment of non-suit, upon the ground that upon plaintiff's evidence he was not entitled to recover under the Federal Employers' Liability Act. This is defendant's Exception No. 1.

2. For that the Court, over defendant's objection and exception, excluded the following evidence in the deposition of W. Hugh Powell, offered on behalf of the defendant:

"Q. Then how did he live?

"A. Well, he lived on we merchants around there."

This is defendant's Exception No. 2.

35 3. For that the Court, over defendant's objection and exception, excluded the following evidence in the deposition of W. Hugh Powell, offered on behalf of the defendant:

"Q. In what way do you mean?

"—. Bought stuff and did not pay for it."

This is defendant's Exception No. 3.

4. For that the Court, over defendant's objection and exception, excluded the following evidence in the deposition of W. Hugh Powell, offered on behalf of the defendant:

"Q. How was he generally regarded here?

"A. He was regarded as being a kind of worthless darkey, I reckon. He was in my estimation.

This is defendant's Exception No. 4.

5. For that the Court, over defendant's objection and exception, excluded the following evidence in the deposition of W. A. Powell, offered on behalf of the defendant:

"Q. How was he regarded by the people?

"A. Almost as nobody. He was not regarded as anything but a nuisance and in the way. I have ordered him out of the store more than once because he was sitting around in the way, and doing nothing."

This is defendant's Exception No. 5.

6. For that the Court, over defendant's objection and exception, excluded the following evidence in the deposition of B. F. Britt, offered on behalf of the defendant:

"Q. Was he looked upon as an industrious, thrifty negro?

"A. No, sir."

This is defendant's Exception No. 6.

7. For that the Court overruled defendant's motion of non-suit at the conclusion of all the evidence. This is defendant's exception No. 7.

8. For that the Court refused to give the following instruction as requested by defendant:

"If you believe the evidence you will answer the first issue 'No;' the second issue 'No,' and the third issue 'Nothing.'"

This is defendant's Exception No. 8.

36 9. For that the Court refused the following request by the defendant for a directed verdict:

"The defendant requests the court to direct a verdict in its favor on the ground that the right of plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, and the evidence shows that the plaintiff's intestate did not leave surviving any next of kin dependent upon him."

This is defendant's Exception No. 9.

10. For that the Court refused to give the following instruction as requested by defendant:

"The Court charges you that unless you find by the preponderance of the evidence, the burden of proof being upon the plaintiff, that Beb Isaac Eason, or Beb Isaac Capehart, was born in lawful wedlock, you will answer the issue of damages 'Nothing.'"

This is defendant's Exception No. 10.

11. For that the Court refused to give the following instruction as requested by the defendant:

"The Court charges you that if you find from the evidence that plaintiff's intestate, Beb Isaac Eason, or Beb Isaac Capehart, was the son of W. C. Eason and that W. C. Eason was not the lawful husband of Emaline Capehart, you will answer the issue of damages 'Nothing.'"

This is defendant's Exception No. 11.

12. For that the Court refused to give the following instruction as requested by defendant:

"The Court instructs you that by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, the plaintiff's right to recover in this action is dependent upon Beb Isaac Capehart, or Beb Isaac Eason, plaintiff's intestate, having left surviving him next of kin dependent upon him, and the Court instructs you that it appearing from plaintiff's evidence, that

37 plaintiff's intestate was an illegitimate child, the parties named in the complaint for whose benefit this action is brought, are not plaintiff's intestate's next of kin, and you will answer the first issue 'No.'"

This is defendant's Exception No. 12.

13. For that the Court instructed the jury as follows, to which defendant objected and excepted:

"If the jury shall find from the evidence that Beb Isaac Capehart, Sills Hardy, Joe Hardy, and Nettie Hardy, were all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy, and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead; that Beb Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.'"

This is defendant's Exception No. 13.

14. For that the Court instructed the jury as follows, to which defendant objected and excepted:

"It is not necessary for the jury to find that these children were solely and absolutely dependent upon Beb Isaac Capehart for their support and maintenance, in order that this issue should be answered 'Yes.' If the jury shall find, by the greater weight of the evidence that these children are the brothers and sister of Beb Isaac Capehart; that Beb Isaac was the eldest child of his mother, and recognized his relationship to the children, and had assumed the duty of aiding in the support and maintenance of these children, and did, according to his ability, aid the aunt and uncle of the children in supporting and maintaining the said children by contributing money and cloth for them, then the jury should answer the issue 'Yes.'"

This is defendant's Exception No. 14.

15. For that the Court instructed the jury as follows, to which defendant objected and excepted:

38 "If the jury shall find that Beb Isaac Capehart was the illegitimate child of his mother, that some years after his birth his mother married and had children born to her, as issue of said marriage; that thereafter Beb Isaac Capehart left the home in which the children were living and went to the home of his reputed father and lived with him as a member of his family, separating himself from his half brothers and sister, and refusing to recognize any relation to them; that thereafter he left his reputed father's home and went to Boykins, Va., where he lived until his death, making no contribution for the support and maint*ai*nance of the children, and that in the meantime the children remained with their aunt and uncle, not looking to or receiving [support] from Beb Isaac Capehart, then you should answer this issue 'No,' although you may find that on two or three occasions, out of charity or good will, he contributed small sums to the aid of the children."

This is defendant's Exception No. 15.

16. For that the Court overruled defendant's motion for judgment non obstant*i* veredicto. This is defendant's Exception No. 16.

17. For that the Court overruled defendant's motion for a new trial for errors occurring during the trial: In the exclusion of evidence; in the refusal to dismiss the action; in the refusal to give defendant's requests for instructions, and in the charge as given. This is defendant's Exception No. 17.

18. For that the Court refused defendant's motion to set aside the verdict. This is defendant's Exception No. 18.

19. For that the Court signed judgment as appears in the record. This is defendant's Exception No. 19.

MURRAY ALLEN,
J. B. MARTIN,
Defendant's Attorneys.

39 The foregoing is tendered by the defendant as its statement of case on appeal.

This 3rd day of June, 1914.

J. B. MARTIN,
MURRAY ALLEN,
Defendant's Attorneys.

Service of foregoing statement of case on appeal accepted and copy received, this 3rd day of June, 1914.

WINSTON & MATTHEWS,
Plaintiff's Attorneys.

Defendant's case on appeal and plaintiff's exceptions thereto heard by me at Wilson, N. C., on July 6th, 1914, by consent and case settled as appears herein.

GEO. W. CONNOR,
Judge, etc.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
Bertie County:

I, W. L. Lyon, Clerk of Superior Court of county and State aforesaid, do hereby certify that the foregoing contains a full, true and perfect transcript of the record in a civil action lately pending in said court between S. W. Kenney, administrator of B. Isaac Capehart, alias B. Isaac Eason, plaintiff, and the Seaboard Air Line Railway, defendant.

In testimony whereof I hereunto set my hand and affix the seal of said court at office in Windsor, this 11th day of July, A. D. 1914.

[SEAL.] W. L. LYON,
Clerk Superior Court Bertie County.

40 *Docket Entries.*

Appeal docketed July 14, 1914.
Argued September 15, 1914.
Opinions by Clark, C. J., and Walker and Brown, JJ., filed September 30th, 1914, as follows:

41 Supreme Court of North Carolina, August Term, 1914.

#105.

S. W. KENNY, Adm'r,
v.
SEABOARD AIR LINE RAILROAD CO., Appellant.

Bertie.

Appeal from Connor, J., May Term, 1914, of Bertie.

Winston & Matthews for plaintiff.
Murray Allen for defendant.

CLARK, *C. J.:*

This is an action for wrongful death, under the Federal Employees' Liability Act, by the administrator of an illegitimate child.

The Federal statute provides that such action shall be maintained "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee." The mother of the intestate is dead, but left two sons and a daughter of tender age and dependent, born in wedlock.

The sole contention of the defendant, requiring our consideration, is that the expression "next of kin", as used in section 1 of this Act, is to be construed by the common law, disregarding the State law defining those words. Rev. 137 provides: "Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in the case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock." To same purport, Rev. 1556, Rule 10; Powers v. Kite, 83 N. C. 156; McBryde v. Patterson, 78 N. C. 412.

The Federal statute provides that this action may be brought in our courts. It is very clear that in North Carolina the two half brothers and the sister of the intestate are his next of kin.

42 It seems to us immaterial whether it were formerly otherwise in this State, either by statute or the common law before any statute. The question is, who was the "next of kin" at the time of such death in the State where the wrongful death occurred.

In Hutchinson Investment Co. v. Caldwell, 152 U. S. 65, the Court held: "In States whose laws permit illegitimate children, recognized by the father in his lifetime, to inherit from him, such children are 'heirs' within the meaning of U. S. Rev. Stat., sec. 2269, which provides that when a party entitled to claim the benefits of the preemption laws of the United States dies before consum-ating his claim, his executor or administrator may do so, and the entry in such case shall be made in favor of his heirs, and the patent, when issued, inures to them as if their names had been specially mentioned."

In that case, it was contended that the word "heirs" was used in the common law sense. The Court said: "Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State, which was both the situs of the land and the domicile of the owner" It has been often held that there is no common law for the Federal Courts. The contention that the next of kin must be the same in all the States is not in accordance with the intent of the Act. Indeed, there could be no uniformity if that was desirable, for there is no common law in Louisiana, and the common law is much modified in some of the States which we acquired from Mexico and France, and on many subjects the rule of the common law has been held differently in the different States.

This case cites U. S. v. Fox, 94 U. S. 315, and is cited in Moen v. Moen, 16 S. D. 214.

In Cutting v. Cutting, 6 Fed. Reporter 268, where the Act of Congress prescribed that the heirs of a married settler should
43 receive a patent where he had not taken it out, it was held: "Who are the heirs of Charles Cutting is a matter to be determined by the local law—the law of Oregon—as is also the question who is his wife. Both these are left to the local law of Oregon, quoting from Lamb v. Starr, 1 Deady 358. 'Who would be entitled to claim as heir (or wife) of the deceased would in all cases depend upon the law of Oregon at the time of the death'." The same ruling was made as to "next of kin", being governed by the law of the domicile in McCool v. Smith, 66 U. S. (1 Black) 459.

The object of the Act of Congress was to permit a recovery for wrongful death or injuries on interstate railroads, and that the recovery should go to the next of kin in the cases specified, the next of kin being determined by the law of the State in which the action is brought, for the status of the citizen, and the statute regulating descent and distribution is purely a State matter, with which Congress has no concern. By the reasoning in the case above cited, the word "next of kin" is taken, like the word "heirs", as meaning those to whom the property would go, but who are the heirs and who are the next of kin is a matter purely of State regulation.

The decision in Taylor v. Taylor, 34 Supreme Court Reporter 350, decided Feb. 1914, holds that the right of action given to the employee survives to his personal representative for the benefit of his parents only when there is no widow, and that the Act of Congress prescribing what class are the beneficiaries and the order in which they take, controls though the State statute fixes a different order of succession. But there is nothing in this decision which militates against the holding in Hutchinson v. Caldwell, supra, that who are the "heirs" or the "next of kin" is regulated by State statute.

The evidence as to the tender age of the children and being without estate, was sufficient evidence to be submitted to the
44 jury on the question of their being dependent. And the fact has been found by the jury, who evidently gave due weight to the evidence of the earning capacity of intestate, as may be inferred from the smallness of the verdict. The exceptions to evidence need not be discussed.

No error.

#105.

45

KENNEY
v.
RAILROAD.

Bertie.

WALKER, *J.* (concurring):

It seems to me that this case is governed by McCool v. Smith, 1 Black (66 U. S.) 459, in which the question arose as to the law

by which is to be determined who are the "next of kin" of a person, as those words were used in a federal statute. The Court there held that the law of the domicile controlled, and not the common law, and in Hutchinson v. Investment Co., 152 U. S. 65, relied on by plaintiff, it is said that in the McCool case, the Court decided that the common law governed simply because the State of Illinois, where the parties were domiciled, had adopted the common law by statute, and, therefore, the term "next of kin" was construed by the local law, or law of the domicile, as that was the rule of the common law as to the law applicable in such cases, and Illinois had then only the common law in force. She afterwards enacted a statute of distributions. In the Hutchinson case, the same rule was applied, as to the meaning of the word "heirs", and the question was decided by the lex loci rei sitæ—the law of the State where the land was situated. In the cases cited by defendant, and in the dissenting opinion, the Court was referring to the common law, as applicable, when deciding upon the legal rights of the parties, such, for instance, as the question of negligence, where there is no federal statute defining those rights, or rather, the principles by which they are to be determined. The Court, therefore, held in the McCool case, that the "next of kin", as referred to in the federal statute, are those who answer to that description under the State law where the parties are domiciled, and not by the common law, unless that be the law of the particular State.

46 No. 105.

S. W. KENNEY, Administrator,
vs.
SEABOARD AIR LINE RAILWAY COMPANY.

BROWN, *J.*, dissenting:

1. It is admitted that this action is brought under the Federal Employers' Liability Act by the administrator of Beb Isaac Capehart, deceased, for the benefit of his next of kin. I admit that under the statute in this state it is not necessary to allege or prove who are the next of kin in order to recover for the negligent killing of a person. But the language of the Federal Statute is different and the action is brought by the personal representative of the decedent "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee."

The right to recover damages for wrongful death is purely statutory and did not exist at common law and it follows that the provisions of the statute, under which the particular action is brought, must control it.

Under the Federal Act, it seems to be settled by the current of recent authority that the existence of beneficiaries, such as are named in the statute, must be pleaded and proved. Where a statute gives a right of action for death by wrongful act, if no such persons

or class of persons exist as are described in the statute, as the beneficiary of the recovery, the action cannot be maintained.
13 Cyc. 335.

The liability of the defendant is made contingent upon the existence of one or more beneficiaries, or the fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is
47 no beneficiary, which meets the description of the statute, there is no right of action.
Melzner vs. Ry., 127 Pacific 1002.

In Illinois Central Railroad Co. vs. Doherty, 155 S. W., page 1121, the Court of Appeals of Kentucky distinguishes the Kentucky statute, which is very much like ours, from the Federal Act, and holds that under the Act of Congress, if there is no one for whom a recovery can be had, there can be no recovery. This Federal Act is supreme in all actions brought to recover for the death of an employee in interstate commerce, and supercedes all State statutes creating a right of action for death by wrongful act.
R. R. vs. Birch, 224 U. S., 547.

2. His Honor instructed the jury: "If the jury shall find from the evidence that Beb Isaac Capehart, Sills Hardy, Joe Hardy and Nettie Hardy, were all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy, and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead, that Beb Isaacs Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.'"

I am of opinion that the words "next of kin", as used in Federal Act, are not to be defined by the various and differing statutes of the many states of this union, but are to be construed in the light of the common law. It is not to be supposed that this act, intended for the benefit and protection of employees engaged in interstate commerce, should be administered differently in every state in the union.

Mr. Doherty says: "It is inconceivable that the power of Congress to create a fund for the benefit of the widows and orphans of railroad employees, and to determine the beneficiaries of this fund or to make the personal representative trustee for its distribution in the manner set forth in the statute, is in any manner impaired or affected by the laws of a State governing the distribution of the estate of the deceased."
48 Doherty, Liability of Railroads to Interstate Employees, p. 241.

In its sphere the Federal Act is complete, and in matters of substance it is not to be added to or changed by State regulations. In Michigan Central R. R. Co. vs. Vreeland, 33 Sup. Ct. Rep., 192, the late Justice Lurton says:

"We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States."

It seems to be pretty well settled by the decisions of the Supreme Court of the United States that in the construction of the laws of Congress, rules of the common law furnish the true guide.

Rice vs. Railroad Co., 65 U. S., page 374.
U. S. vs. Sanges, 144 U. S., page 311;
Charles River Bridge vs. Warren Bridge, 11 Peters, 420;
Standard Oil Case, 221 U. S., 1;
American Tobacco Co. Case, 221 U. S., 106.

"The principles of the common law are operative upon all interstate transactions except so far as they are modified by Congressional enactment."

Western Union Tel. Co. vs. Call Publishing Co., 181 U. S., 92.

In S. A. L. Ry. vs. Horton, 34 Supreme Court Reporter, 635, Mr. Justice Pitney says:—

"It is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislature of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would
49 in effect relegate to State control two of the essential factors that determine the responsibility of the employer."

The learned Judge further says that "the adoption of the opposite view would in effect leave the several state laws and not the act of Congress to control the subject matter." See also Southern Railway Co. vs. Crockett, 34 Supreme Court Reporter, 897.

I am unable to see anything in the case relied upon by the plaintiff and cited in the opinion of the Court, Hutchinson Investment Co. vs. Caldwell, which militates against this position. In that case the court was passing upon the rights of certain parties to preempt land, and it was in respect to local laws that the court was speaking.

The court held, what is universally known, that in respect to the designation of heirs, the matter is to be determined by the situs of the land and the domicil of the owner. The construction which the majority opinion gives to the Federal Statute in this case is opposed to the decision of the Supreme Court in the recent case of Taylor vs. Taylor, 34th Supreme Court Reporter, 350, in which it is held that nothing in the State Statute for the distribution of personal property can effect the right of the childless widow of an interstate railway employee, who was fatally injured while employed by the carrier in interstate commerce, to the entire net

proceeds of a judgment for the resulting damages recovered by her as administratrix in an action against the carrier.

We think the elementary principles of statutory construction, applied to the act of Congress, compel the conclusion that in the use of the words "next of kin", Congress must have had in mind the well known meaning of those words according to the common law.

"It is a well settled principle, that if a statute makes use of a word, the meaning of which is well known, and which has a definite sense at common law, it shall be received in that sense, unless from some reason it clearly appears that it was intended to use the word in a different signification."

State vs. Engle, 21 N. J. Law, page 360.
Adams vs. Turrentine, 30 N. C., 147.

"It is a sound rule that whenever a legislature in this country uses a term without defining it, which is well known in the English law, it must be understood in the sense of the English law."

McCool vs. Smith, 66 U. S., 459;
Kitchen vs. Tyson, 7 N. C., 314.

Any other construction of the act would bring disorder and confusion in its administration, as the laws of the State differ in so many particulars. In North Carolina illegitimate children, born of the same mother, by statutory enactment are rendered legitimate as between themselves. In Alabama one illegitimate child can inherit from another of the same mother; in Missouri he can not. In Tennessee and Vermont legitimate children inherit from illegitimate children, but illegitimate children do not inherit from legitimate children of the same mother. In Pennsylvania illegitimate children inherit from the mother and the mother from the children, but the children cannot inherit from each other. In Kentucky, when an illegitimate child dies intestate without issue, leaving no mother surviving, the legitimate children of his mother cannot inherit his estate. In North Carolina they can.

If the laws of the States governing the distribution of personal property are to determine who are next of kin, then in the event the deceased was a resident of another State at the time of his death, our courts would have to look to the law of the domicile to determine for whose benefit the action can be maintained, because "the law of the decedent's domicile governs the distribution of his personal estate."

Smith vs. Howard, 41 Am. St. Rep., 537 and note.
Leak vs. Gilchrist, 13 N. C., 75;
Alvany vs. Powell, 55 N. C., 51;
Medley vs. Dunlop, 90 N. C., 527.

In the present case it appears that the deceased was a resident of Boykins, Va. at the time of his death, and we would have to look to the law of Virginia to determine whether an illegitimate child can leave next of kin as defined by the Federal Act.

At common law the words "parent", "child", "next of kin", and words of similar import, were held not to include illegitimates.

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate unless a different intention is clearly manifested."

McCool vs. Smith, 66 U. S., 459.

After stating this principle, the United States Supreme Court says: "This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it. The legal position of Alonzo Redman at the time of his death was what the common law made it. In the eye of the law he was nullius filius. He had neither father, mother, nor sister. He could neither take from nor transmit to those standing in such relations to him any estate by inheritance."

Prior to the enactment of Revisal, Sec. 137, the courts of this State recognized the common law rule that an illegitimate child can have no next of kin. In Coor vs. Starling, 54 N. C., 243, Chief Justice Nash says:

"Edwin Jones was a bastard, and by the common law no such consanguinity existed between him and his bastard brother as enabled the latter or his issue to claim any portion of his estate, real or personal. A bastard can be heir to no one, nor can he have any heirs, but of his own body, for being nullius filius he is kin to no one."

It has been frequently held by the State courts in which the question has arisen that terms of kindred used in statutes
52 based upon Lord Campbell's Act relate exclusively to legitimate and not to illegitimate children.

In South Carolina the statute gives the right of action to the parent or parents. The Supreme Court of that State has held that: "A mother cannot recover as sole beneficiary under Lord Campbell's Act for the wrongful death of her illegitimate child."

McDonald vs. R. R., 71 S. C., 352;

When the right of action for death by wrongful act is given to a "child" or "children" of decedent, it has been held by the Supreme Court of Georgia to mean legitimate child, and the mother of a bastard was denied the right to recover notwithstanding statutes of the State of Georgia provided that "bastards may inherit from their mother and from each other, children of the same mother, in the same manner as if legitimate."

Robinson vs. R. R., 117 Ga., 168.

In Railroad vs. Johnson, 77 Miss., 727, the Mississippi Supreme Court says:—

"An illegitimate daughter cannot maintain an action for damages caused by the wrongful killing of another illegitimate daughter of the same mother, since our statute creating causes of action for the death of a person, like Lord Campbell's Act, confers the right to sue only on legitimate relatives."

"The father of an illegitimate child has no right of action for the child's death under Rev. Stat. 1894, Sec. 267, giving a father a right of action for the death of a 'child', although the mother is dead and the child had been acknowledged by the father and had no guardian or next of kin except him."

McDonald vs. R. R., 144 Indiana, 459.

There is nothing in the Act of Congress which indicates that illegitimate children should be regarded as legitimate as between themselves and should take as beneficiaries under the Act.

I am, therefore, constrained to hold, upon the admitted facts, that this action cannot be maintained.

Hoke J. concurs in this dissent.

A true copy.

J. L. SEAWELL, *S. C. C.*

[Seal of the Supreme Court of the State of North Carolina.]

53 *Judgment.*

Supreme Court of North Carolina, August Term, 1914.

No. 105. Bertie County.

S. W. KENNEY, Administrator,
vs.
SEABOARD AIR LINE RAILWAY.

This cause came on to be argued upon the transcript of the record from the Superior Court of Bertie County:—Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, towit, the sum of Nineteen 10/100 Dollars ($19.10), and execution issue therefor.

54 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the transcript of appeal to this Court in the case lately pending therein entitled S. W. Kenney, Administrator, against Seaboard Air Line Railway, as appears from the original on file in this Court.

Witness my hand and seal of said Court at office in Raleigh this 19th day of October, 1914.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court.

Endorsed on cover: File No. 24,411. North Carolina Supreme Court. Term No. 637. Seaboard Air Line Railway, plaintiff in error, vs. S. W. Kenney, administrator of Beb Isaac Capehart, alias Beb Isaac Eason. Filed October 22d, 1914. File No. 24,411.

14

Office Supreme Court, U. S.
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MAR 11 1916
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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 269.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

S. W. KENNEY, ADMINISTRATOR OF BEB ISAAC CAPEHART, ALIAS BEB ISAAC EASON.

CITATIONS REFERRED TO BY COUNSEL FOR PLAINTIFF IN ERROR IN ORAL ARGUMENT.

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MURRAY ALLEN,
Counsel for Plaintiff in Error.

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2. Is the surviving father of a deceased employee, who was an illegitimate child, the parent of such employee within the provisions of said section?
3. If the alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy, are next of kin of the deceased employee, were they dependent upon such employee, as required by said section?

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
v.
S. W. KENNEY, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason,
Defendant in Error.

No. 667.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This is an action brought in the Superior Court of Bertie County, North Carolina, by S. W. Kenney, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason, to recover damages for the death of his intestate caused by the negligence of the Seaboard Air Line Railway in shifting cars at Kelford, N. C., on December 20, 1912. The plaintiff in the trial court, defendant in error in this court, offered evidence at a former trial of the case to sustain his allegations that his intestate was caused to fall from the top of a car on which he was employed, and was killed by the negligence of the defendant, now plaintiff in error, and the jury an-

swered the issues of negligence and contributory negligence against the defendant and assessed the damages at $1,250. Upon appeal by the defendant, the Supreme Court of North Carolina ordered a new trial on the issues of contributory negligence and damages, for error in the instructions of the trial court to the jury on the latter issue. (For report of case, see 165 N. C., 101, 80 Southestern Reporter, 1078.) The finding on the issue of negligence was affirmed. The case was sent back to the Superior Court of Bertie County for another trial. Upon this second trial there was verdict and judgment against the defendant for $800, and, upon appeal, this judgment was affirmed, and the writ of error brings up for review the judgment of the Supreme Court of North Carolina affirming the judgment entered in the Superior Court of Bertie County. Upon both trials it was admitted by counsel for the plaintiff and defendant that at the time of the death of plaintiff's intestate, the defendant was engaging in interstate commerce; that defendant's train was being operated between Lewiston, N. C., and Boykins, Va., and was transporting interstate commerce, and that the plaintiff's intestate was employed by the company, and was killed by the train while employed on that train on the particular occasion when the defendant was running it and while he was employed by defendant in such commerce. (Printed record, page 19).

This brings the case clearly within the provisions of the Federal Employers' Liability Act, and makes Section 1 of that act determinative of plaintiff's right to maintain this action.

The complaint as originally filed alleged generally that the plaintiff, as administrator, was entitled to recover the sum of seven thousand, five hundred dollars, which he demanded. There was no allegation that the deceased employee left surviving any of the beneficiaries named in the Federal Act.

Upon the first appeal, defendant entered a demurrer in the Supreme Court of North Carolina upon the ground that the complaint failed to state a cause of action in that there was no allegation of the existence of any of the parties named in the Federal Employers' Liability Act for whose benefit the administrator is entitled to recover. The Supreme Court of North Carolina overruled the demurrer, and ordered a new trial, and granted plaintiff permission to amend his complaint by alleging the existence of beneficiaries, and defendant was given leave to traverse the allegations of the amendment, if so advised. Plaintiff thereupon filed an amendment to his complaint, as follows:

1. Add to paragraph 1 of the complaint the following:

"And that Beb Isaac Capehart died as aforesaid, leaving no wife nor children, never having married; that both his mother and father died some years ago and before the death of said Beb Isaac Capehart; that at the time of his death the said Beb Isaac Capehart had two brothers and one sister, whose names are Sills Hardy, Joe Hardy, and Nettie Hardy, and who were and are his next of kin; and that the said brothers and sister were the next of kin dependent upon him for support, and they were dependent upon him for their support, all being of too immature an age to earn a living, and this action is brought by plaintiff administrator in behalf of the said infants next of kin so dependent." (Printed record, page 15.)

2. Add to paragraph 9 of the complaint, the following:

"For the use and benefit of the infant brothers and sister, herein above named as next of kin of Beb Isaac Capehart who were dependent upon him for support, to compensate them for the pecuniary loss they have sustained and will sustain by reason of the death of the said Beb Isaac Capehart as alleged herein." (Printed record, page 15.)

The allegations of this amendment were denied by the defendant, and issues were thus raised as to the existence of

next of kin of the plaintiff's intestate, and as to their dependency upon the intestate.

It was admitted by plaintiff (printed record, page 19), and also appears from plaintiff's evidence, that his intestate was an illegitimate child of Emaline Capehart, who, after the birth of the intestate, married Joe Hardy, and the children named in the complaint as beneficiaries are the children of Emaline Capehart by her husband. (Printed record, page 20.)

In support of the allegation that the beneficiaries named in the complaint, Sills Hardy, Joe Hardy and Nettie Hardy, were next of kin dependent upon the intestate for support, plaintiff offered the following evidence:

Ida Lawrence testified:

Wife of Jim Lawrence; aunt of Capehart. His mother was Emaline Hardy. She and husband dead. Her oldest child is Beb Isaac Hardy, alias Capehart. Emaline has three living children: Sills Hardy, Joe and Nettie Hardy. Sills is about 8 or 9 years old. Joe is about 7, and Nettie 6. All live with me. Have been with me 6 years. Mother gave them to me. Beb Isaac worked and turned over wages to me for children. Beb named Isaac Hardy. He was born before sister married Hardy. Sills first child born after marriage. Emaline not married when Beb Isaac was born. First husband was Hardy. Don't know who Beb's father was. He was born before she was married. I took children to take care of them. Beb stayed with me one year and six months. Went away from me. Stayed in Bertie until he went to Boykins. Came home twice and stayed two or three days. He brought me money for children. He brought about $3 one time, also cloth for suit of clothes for each child. Every time he came he brought money and clothes for children. Children got biggest part of what he made. He turned it over to me, but I don't know how much. I have the children and take care of them just as I did before Beb died. After

leaving my house he worked around Roxobel, six or seven miles from my house. After he went to Boykins he would come home and bring something for children. He worked on train. (Printed record, page 20.)

James Lawrence testified:

Husband of Ida. Beb helped to take care of brothers and sister. He had been gone six years. When he worked for Mr. Purvis his wages paid me for children. Towards last he gave us more than he did at first. He was working for railroad. I saw him once on train. He spoke to me. It was not mail train. No one helped support children except Beb Isaac. Beb did not work for me. He worked for Mr. Purvis. I did not charge board. He did not run away. Went to Roxobel. David Eason was his grandfather. He stayed with Charlie Eason. He called W. C. Eason's people his folks. He gave me $2.50 once for children. $2.00 once. This while at Boykins. He also sent money—$1.50. Along every month I got something for children. I gave money to children. I bought clothes for children. (Printed record, page 20.)

W. J. Purvis testified:

I live six miles from Roxobel. I knew deceased. I remember when his mother died and he went to Lawrence. I gave wages to Jim to take care of children. He was average boy. He was about 15 years old. I paid him $12.50 per month and board. One and a half years—farm hand. He had left me three or four years before death. He worked at Roxobel. Don't know with whom. I saw him on freight train three or four times after he left Roxobel. I saw him as often as three times in one year. I do not live on railroad. He clothed himself out of wages when he worked with me. I turned over wages to Jim. Cost about $6.00 per month to clothe him. I gave rations and his uncle did cooking for him. Worth $3.00. Cost of living about $9.00

per month. Never saw him use tobacco or whiskey. (Printed record, page 21.)

At the conclusion of this evidence, defendant moved to dismiss the action and for judgment of nonsuit. Motion overruled, and defendant excepted. (Printed record, page 21.)

The defendant then offered testimony of numerous witnesses (printed record, pages 21 to 26), residents of the town of Boykins, Va., where the plaintiff's intestate was living just prior to the time of his death, showing that he was practically an object of public charity and that his total earnings would not exceed $4.50 per month. B. F. Taylor, a policeman, testified that he had lived in Boykins three years; that he knew deceased; that he never knew him to have a job, and that he didn't think deceased made anything. (Printed record, page 23.) H. B. Simmons testified that he was a salesman in Boykins; that the deceased had no regular job; that he was not thrifty; that he worked just enough to get a living, and that $4.00 is the maximum amount he would earn. (Printed record, page 23.) F. L. Harris testified that plaintiff's intestate peddled around for a living, and made $3 or $4 per month (printed record, page 23); that he appeared to be a kind of dead beat, and was generally regarded as an almost worthless character. (Printed record, page 25.) B. F. Phelps, deputy sheriff at Boykins, testified that he knew deceased; that he was not thrifty, and had no regular employment; that his average income was $3 or $4 per month. (Printed record, page 23.) W. P. Edwards, mayor of the town of Boykins, testified that he knew deceased; that he never knew him to do anything except cut wood, etc.; that he would earn $3 or $4 per month. (Printed record, page 23.) Whit Walden testified by deposition that $3 or $4 a month was all deceased was worth. (Printed record, page 24.)

J. F. Murrell testified:

"I never saw that negro do any work. I do not know as I ever saw him have any little job of any kind. I do not really know how he got his living, anyway. He certainly did not seem to work for it." (Printed record, page 26.)

B. F. Taylor testified:

"I should not call him a very industrious and thrifty negro. Do not think he had any regular work. I never heard of any. I don't know how people looked on him, but I do know how he was looked on by me. I did not think he was much. Mighty common boy; trifling. I saw him often. He was not any good. The Seaboard agent tried to get me, as town sergeant, to run him away from here, several times, because he was staying around here and was not any good." (Printed record, page 26.)

The defendant also offered evidence to show that W. C. Eason, witness for defendant, was father of plaintiff's intestate; that at the time of his death plaintiff's intestate was acting as substitute for the regular brakeman; that he was occasionally employed in this capacity when no one else could be secured; that during the year 1912, he was paid the total sum of $13.98 for such services. (Printed record, page 22.)

At the conclusion of all the evidence, defendant again moved to dismiss the action and for judgment of nonsuit. Motion overruled, and defendant excepted. (Printed record, page 26.)

Issues were submitted to the jury and answered as follows:

1. Are Sills Hardy, Joe Hardy and Nettie Hardy next of kin of the intestate, Beb Isaac Capehart, alias Beb Isaac Eason, as alleged in the complaint?

Answer: "Yes."

2. If so, were the said Sills Hardy, Joe Hardy and Nettie Hardy dependent upon said intestate, Beb Isaac Capehart?

Answer: "Yes."

3. What sum, if any, is plaintiff entitled to recover of the defendant, as damages?

Answer: "$800.00."

Upon this verdict judgment was rendered in the Superior Court of Bertie County against defendant for the sum of $800. Defendant appealed to the Supreme Court. The appeal was argued at Fall Term, 1914, of the Supreme Court of North Carolina, and the judgment of the Superior Court of Bertie County was affirmed in an opinion by Chief Justice Clark. Associate Justice Brown filed a dissenting opinion in which Associate Justice Hoke concurred. The defendant thereupon sued out this writ of error under Section 709 R. S., to review the judgment of the Supreme Court of North Carolina. The opinions are printed in full in the record, pages 34 to 42, and will also be found in 82 Southeastern Reporter, page 968.

SPECIFICATIONS OF ERROR.

The Plaintiff in Error specifies and relies upon the following errors committed by the Supreme Court of North Carolina:

First. The Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by the defendant under Section 1 of the Federal Employers' Liability Act in construing the words "next of kin," as meaning next of kin as fixed by State statute and not as determined by the common law, and in holding that the plaintiff was entitled to recover damages for the death of his intestate, who was an illegitimate child, for the benefit of the children of his mother born in wedlock.

Second. The Supreme Court of North Carolina committed error and its decision was against the rights set up and claimed by the defendant under Section 1 of said Federal Employers' Liability Act, in holding that there was sufficient evidence to be submitted to the jury on the question of the

dependence upon the intestate of the children of the mother of plaintiff's intestate, born in wedlock, and in holding that plaintiff was entitled to recover damages for the benefit of said children, caused by the death of the intestate.

Third. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to grant defendant's motion for judgment of nonsuit made at the conclusion of plaintiff's evidence and at the conclusion of all the evidence, upon the ground that the plaintiff left surviving no next of kin as fixed by Section 1 of the Federal Employers' Liability Act and left surviving him no next of kin dependent upon him for whose benefit this action could be maintained, and upon the ground that it did not appear that the father of plaintiff's intestate was dead. Defendant's exceptions No. 1 and No. 7. (Printed record, pages 21 and 26.)

Fourth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury as follows: If you believe the evidence you will answer the first issue 'No,'" the first issue being: "Are Sills Hardy, Joe Hardy and Nettie Hardy next of kin of the intestate, Beb Isaac Capehart, alias Beb Isaac Eason, as alleged in the complaint?" Defendant's Exception No. 8. (Printed record, page 27.)

Fifth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to grant defendant's request for a directed verdict as follows: "The defendant requests the court to direct a verdict in its favor on the ground that the right of plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, and the evidence shows that the plaintiff's intestate did not leave surviving any next of kin dependent upon him." Defendant's Exception No. 9. (Printed record, page 27.)

Sixth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury, as follows: "The court charges you that unless you find by the preponderance of the evidence, the burden of proof being upon the plaintiff, that Beb Isaac Eason, or Beb Isaac Capehart, was born in lawful wedlock, you will answer the issue of damages 'Nothing.' " Defendant's Exception No. 10. (Printed record, page 27.)

Seventh. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury, as follows: "The Court charges you that if you find from the evidence that plaintiff's intestate, Beb Isaac Eason, or Beb Isaac Capehart, was the son of W. C. Eason and that W. C. Eason was not the lawful husband of Emaline Capehart, you will answer the issue of damages 'Nothing.' " Defendant's Exception No. 11. (Printed record, page 27.)

Eighth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to give the defendant's request for special instruction to the jury, as follows: "The Court instructs you that by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, the plaintiff's right to recover in this action is dependent upon Beb Isaac Capehart, or Beb Isaac Eason, plaintiff's intestate, having left surviving him next of kin dependent upon him, and the Court instructs you that it appearing from plaintiff's evidence, that plaintiff's intestate was an illegitimate child, the parties named in the complaint for whose benefit this action is brought, are not plaintiff's intestate's next of kin, and you will answer the first issue 'No.' " Defendant's Exception No. 12. (Printed record, page 28.)

Ninth. For that the Supreme Court of North Carolina erred in refusing to hold that the trial court committed error in instructing the jury as follows: "If the jury shall find

from the evidence that Beb Isaac Capehart, Sills Hardy, Joe Hardy and Nettie Hardy, were all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead; that Beb Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.' " Defendant's Exception No. 13. (Printed record, page 29.)

Tenth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing defendant's motion for judgment *non obstante veredicto.* Defendant's Exception No. 16. (Printed record, page 30.)

Eleventh. For that the Supreme Court of North Carolina committed error in upholding the trial court in its refusal to grant a new trial for errors committed during the trial. Defendant's Exception No. 17. (Printed record, page 30.)

Twelfth. For that the Supreme Court of North Carolina committed error in upholding the trial court in refusing to set the verdict aside. Defendant's Exception No. 18. (Printed record, page 30.)

Thirteenth. For that the Supreme Court of North Carolina committed error in refusing to sustain defendant's exception to the judgment signed by the trial court. Defendant's exception No. 19. (Printed record, page 30.)

Fourteenth. For that the Supreme Court of North Carolina committed error in rendering the final judgment against the defendant, Seaboard Air Line Railway, and which is complained of in this case.

Fifteenth. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity, of being governed in respect of plaintiff's right to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved

April 22, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of the plaintiff in error by a construction of said act based upon the laws of North Carolina, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

Sixteenth. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action because the said judgment is in violation of rights granted and protection offered by the Act of Congress approved April 22, 1908, known as the Federal Employers' Liability Act, for that by the terms of Section 1 of said Act, the personal representative of a deceased employee can recover damages only for the benefit of the legitimate next of kin, dependent upon such deceased employee, and only for the next of kin as fixed by the common law, and to permit the plaintiff to recover damages for the death of an illegitimate child for the benefit of the children of his mother born in wedlock, results in denying to plaintiff a right, privilege and immunity created by and arising under the Federal Employers' Liability Act, which has been duly and specially set up and claimed in this proceeding.

Seventeenth. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action in that the defendant has been denied a construction of the Federal Employers' Liability Act, to which it was entitled and which, if granted, would have defeated plaintiff's right to recover in this action.

Eighteenth. The Supreme Court of North Carolina, for the various reasons above set forth, committed error in rendering the final judgment it did render against the defendant in this action.

Questions in the Case.

The questions involved in this writ of error are:

1. Are the alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy, who are legitimate children of the mother of the deceased employee, who was an illegitimate child, next of kin of such employee within the provisions of Section 1 of the Federal Employers' Liability Act?

2. Is the surviving father of a deceased employee, who was an illegitimate child, the parent of such employee within the provisions of said section?

3. If the alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy are next of kin of the deceased employee, were they dependent upon such employee as required by said section?

These questions are raised as follows:

First, by motion entered in the trial court to dismiss the action and for judgment of nonsuit, for that upon plaintiff's evidence he is not entitled to recover under the Federal Employers' Liability Act. This motion was entered at the conclusion of plaintiff's evidence (Exception No. 1, printed record, page 21), and renewed at conclusion of all the evidence. (Exception No. 7, printed record, page 26.)

This motion was denied by the trial court, and such action was affirmed by the Supreme Court of North Carolina.

Second, by request for the trial court to instruct the jury, which was refused, and such refusal affirmed by the Supreme Court of North Carolina (Exception No. 8, printed record, page 27), as follows:

"If you believe the evidence you will answer the first issue 'No'; the second issue 'No', and the third issue 'Nothing.' "

Third, by request for the Court to direct a verdict in favor of the defendant (Exception No. 9, printed record, page 27) on the ground that the right of plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at

session of 1908, and the evidence shows that the plaintiff's intestate did not leave surviving any next of kin dependent upon him. This request was refused, and the refusal was affirmed by the Supreme Court of North Carolina.

Fourth, by exception to the Court's refusal to give the following special instructions requested by the defendant:

"The Court charges you that unless you find by the preponderance of the evidence, the burden of proof being upon the plaintiff, that Beb Isaac Eason, or Beb Isaac Capehart was born in lawful wedlock, you will answer the issue of damages 'Nothing.'" (Exception No. 10, printed record, page 27.)

"The Court charges you that if you find from the evidence that plaintiff's intestate, Beb Isaac Eason, or Beb Isaac Capehart, was the son of W. C. Eason, and that W. C. Eason was not the lawful husband of Emaline Capehart, you will answer the issue of damages 'Nothing.'" (Exception No. 11, printed record, page 27.)

"The Court instructs you that by the provisions of the Federal Employers' Liability Act, enacted by Congress at session of 1908, the plaintiff's right to recover in this action is dependent upon Beb Isaac Capehart, or Beb Isaac Eason, plaintiff's intestate having left surviving him next of kin dependent upon him, and the Court instructs you that it appearing from plaintiff's evidence, that plaintiff's intestate was an illegitimate child, the parties named in the complaint for whose benefit this action is brought, are not plaintiff's intestate's next of kin, and you will answer the first issue 'No.'" (Exception No. 12, printed record, page 28.)

The refusal to give each of the requested instructions was affirmed by the Supreme Court of North Carolina.

Fifth, by defendant's exception to the following instruction to the jury which was approved by the Supreme Court of North Carolina:

"If the jury shall find from the evidence that Beb Isaac Capehart, Sills Hardy, Joe Hardy and Nettie Hardy, were

all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead, that Beb Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.'" (Exception No. 13, printed record, page 29.)

Sixth, by motion for judgment *non obstante veredicto* (Exception No. 16, printed record, page 30); by motion for new trial (Exception No. 17, printed record, page 30); by motion to set verdict aside (Exception No. 18, printed record, page 30); by exception to judgment (Exception No. 19, printed record, page 30).

ARGUMENT.

The agreed statement that, at the time of the occurrence in question, defendant was engaged as a common carrier in interstate commerce, and plaintiff's intestate was employed by the defendant in such commerce, brings the case clearly with the terms of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L., 65, ch. 149, U. S. Comp. Stat. Sup. 1911, p. 1322) as amended April 5, 1910 (36 Stat. at L., 291, Chap. 143, U. S., Comp. Stat. Sup., 1911, p. 1324), set forth in full in the margin*, and that act governs the plaintiff's right to recover to the exclusion of the statutes of the State.

North Carolina Railroad v. Zachary, 232 U. S., 248.

The provisions of this act are supreme in an action brought to recover damages for the death of an employee in inter-

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*"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that every common carrier by railroad while

state commerce and supersede all State statutes creating a right of action for death by wrongful act.

American R. Co. v. Birch, 224 U. S., 547.
Wabash R. Co. v. Hayes, 234 U. S., 86.
Taylor v. Taylor, 232 U. S., 363.
Jones v. Charleston & W. C. Ry. Co., 82 S. E., 415.

Plaintiff has failed to establish two essential elements of the right to recover damages under the Federal Act:

First. That Sills Hardy, Joe Hardy and Nettie Hardy are beneficiaries of the deceased employee.

(a) He has failed to negative the existence of the father of the deceased employee who would have prior right as beneficiary as a parent of the deceased.

(b) He has established the fact that the deceased employee was an illegitimate child, and, therefore, could leave no surviving next of kin.

Second. That the alleged beneficiaries were dependent upon the deceased employee.

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engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Allegation and proof of the existence of beneficiaries, as defined by the Federal Employers' Liability Act, are essential to a right to recover damages for the death of an employee.

The Federal Act, Sec. 1, creates a right of action for death of an employee, while engaged in interstate commerce, in favor of the personal representative of the deceased employee "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's *parents;* and, if none, then of the *next of kin* dependent upon such employee." (Italics added.)

The right to recover damages for wrongful death did not exist at common law and rests entirely on statute and the provisions of the statute under which the action is brought must be strictly complied with.

Michigan Central R. Co. v. Vreeland, 227 U. S., 59.

In *Garrett v. Louisville & Nashville R. R. Co.,* filed November 30, 1914, Mr. Justice McReynolds says:

> "It is now definitely settled that the act declared two distinct and independent liabilities resting upon common foundation of a wrongful injury: (1) liability to the injured employee for which he alone can recover; and (2), in case of death, liability to his personal repre-

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"*Section 2.* That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon

> sentative 'for the benefit of the surviving widow or husband and children,' and if none then of the parents, which extends only to the *pecuniary* loss and damage resulting to them by reason of the death."

It is not only essential that there shall be an allegation of the existence of beneficiaries, but the complaint must contain a positive averment of pecuniary loss or must set out "facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered."

Garrett v. Louisville & Nashville R. R. Co., *supra.*

Being an essential averment, it follows that there must be proof to support it before the plaintiff can recover.

This principle, in its application to the Federal Act, has been announced by several State courts. In the case of *Melzner v. Northern Pacific Ry. Co.,* 127 Pac., 1002, the Supreme Court of Montana says:

> "The action is statutory. Without the statute, the right to bring it would not exist. The representative is vested with the right to bring it, but only for the benefit of those who are named in the statute. He is thereby made a statutory trustee for them, not for the benefit of

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such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"*Section 3.* That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount

the decedent's estate. The fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore if there is no beneficiary within the description of the statute, there is no right of action; for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. If there are none, there is no liability."

In *Illinois Cent. R. Co., v. Doherty's Admr.,* 155 S. W., at page 1121, Justice Settle, of the Court of Appeals of Kentucky, says:

"It is clear that the act does not, like the Kentucky statute applicable to similar cases, allow a recovery merely to compensate the estate of the decedent for his death and consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It therefore expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz.: the beneficiaries named in the order named. This being so, it necessarily follows that in an action under the act of Congress, if there is no one for whom a recovery can be had, there can be no recovery. Proof must therefore be made of

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of negligence attributable to such employee: *Provided,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"*Section 4.* That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee.

> the existence of such surviving beneficiary or beneficiaries, and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged."

Thornton, in his work on the Federal Employers' Liability Act, Section 113, says:

> "If there is no person alive designated as a beneficiary by the statute, then no action can be maintained. The survival of a beneficiary is essential to the maintenance of the cause of action. It is, therefore, essential for the administrator to show that a person survived a deceased employee who was then a beneficiary; and if he do not, his complaint or declaration will be insufficient; and if it do not contain an allegation of that fact, the judgment will be subject to a motion to arrest it."

See also Tiffany, Death by Wrongful Act, Section 182; *Serensen v. Railroad,* 45 Fed., 407; *Ry. Co. v. Maxwell,* 113 Tenn., 464; *Foster v. St. Luke's Hospital,* 191 Ill., 94.

The necessity for pleading the existence of beneficiaries was recognized by counsel for defendant in error, and they set forth in the amendment to their complaint that the intestate died "leaving no wife nor children, never having married; that both his *father* and mother died some years ago."

> "*Section 5.* That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this act, shall to that extent be void: *Provided,* that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity, that may have been paid to the injured employee, or to the person entitled thereto on account of the injury or death for which said action was brought.
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> "*Section 6.* That no action shall be maintained under this act unless commenced within two years from the

Thus the existence of beneficiaries was reduced to "next of kin dependent upon such employee." It was recognized that the administrator must negative the existence of beneficiaries whose rights are prior to those named in the complaint. Therefore, plaintiff pleads that there is neither widow nor children nor *parent* surviving the intestate. The burden was upon plaintiff to support his allegations with proof. There is nothing in the evidence to indicate that the father of the intestate is dead. On the other hand, it appears that his father is living. W. C. Eason testified: "I am supposed to be his father; he called me father." (Printed record, page 23.) It also appears that the intestate was known as Beb Isaac Eason and when he was in Roxobel, N. C., he lived with W. C. Eason. Plaintiff's witness, James Lawrence testified: "David Eason was his (Beb's) grandfather. He stayed with Charlie Eason. He called W. C. Eason's people his folks." (Printed record, page 20.)

Is the *father* of the plaintiff's intestate living? Is he the intestate's *parent* as that word is used in Section 1 of the Federal Act? If so, plaintiff cannot recover for the benfit of the brothers and sister because they would not be beneficiaries under the statute. If plaintiff has failed to negative

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day the cause of action accrued. Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

"*Section* 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of

the existence of prior beneficiaries, he has failed to make out his case, and is not entitled to recover.

If the evidence is not sufficient to show, as a matter of law, that the father of plaintiff's intestate is living, it was at least sufficient to go to the jury on that question, and the trial court erred in refusing to give the following instruction requested by the defendant:

> "The Court charges you that if you find from the evidence that plaintiff's intestate, Beb Isaac Eason or Beb Isaac Capehart, was the son of W. C. Eason, and that W. C. Eason was not the lawful husband of Emaline Capehart, you will answer the issue of damages 'Nothing.'"

This request for instruction was refused, and defendant excepted (Exception No. 11, printed record, page 27; seventh assignment of error).

It is very material that the administrator prove correctly the beneficiaries existing, because the measure of damages is based upon the pecuniary loss sustained, which varies with each class of beneficiaries. It would also seem to be essential for the protection of the defendant that the proper parties receive the amount recovered.

We assume that plaintiff will contend that the admission

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the management and operation of the business of a common carrier.

"*Section 8.* That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees.'

"*Section 9.* That any right of action given by this act to a person suffering injury shall survive to his or

that his intestate was an illegitimate child dispensed with proof to support the allegation that his father is dead, because an illegitimate child is *nullius filius* and has no father. If this is true, it is because the common law says so, and if the common law is to guide us to a true interpretation of the word "parents," as used in the statute, we submit that we must look to the common law to determine the meaning of next of kin.

The expression "next of kin," as used in the Federal Employers' Liability Act, is to be construed in the light of the common law.

It is said to be a well settled principle, that if a statute makes use of a word, the meaning of which is well known, and which has a definite sense at common law, it shall be received in that sense, unless from some reason it clearly appears that it was intended to use the word in a different signification.

State v. Engle, 21 N. J. Law, at page 360.
Kitchin v. Tyson, 7 N. C., 314.
Adams v. Turrentine, 30 N. C., 147.

In *McCool v. Smith,* 66 U. S., 459, this principle of construction is stated as follows:

> "It is a sound rule that whenever a legislature in this country uses a term without defining it, which is well known in the English law, it must be understood in the sense of the English law."

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her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

In the construction of the laws of Congress, the rules of the common law furnish the true guide.

Rice v. Railroad Co., 66 U. S., at page 374.
U. S. v. Sanges, 144 U. S., at page 311.
U. S. v. Wong Kim Ark, 169 U. S., at page 654.
Charles River Bridge v. Warren Bridge, 11 Peters, 420.
Standard Oil Case, 221 U. S., 1.
American Tobacco Co. Case, 221 U. S., 106.

The principles of the common law are operative upon all interstate transactions except so far as they are modified by Congressional enactment.

Western Union Tel. Co. v. Call Publishing Company, 181 U. S., 92.

The term "common law," as used in these cases, means the common law of England, and not of any particular State.

Capital Traction Co. v. Hof, 174 U. S., at page 8.

"In determining the obligations assumed by a common carrier engaged in interstate commerce, the Court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action; and in an action for damages for charging unreasonable rates for transportation from one State to another, shipments made before the adoption of the interstate commerce act are governed by the common law, and those made after the adoption of that act by the common law, as modified by the act."

Murray v. R. R., 62 Fed., 24, cited with approval in Western Union Tel. Co. v. Call Publishing Co., 181 U. S., at page 103.

In discussing the provisions of the Federal Anti-trust Law, in the Standard Oil Case, 221 U. S., at page 59, Chief Justice White says:

"Let us consider the language of the first and second sections, guided by the principle that where words are

> employed in a statute which had at the time a well-known meaning at common law, or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."

The words "child," "children," "brother" and "sister," when used in a statute of descent have been held to mean legitimate child, children, brother and sister, by the Supreme Court of Indiana, upon the principle of statutory construction, that:

> "When words of a definite signification under the common law are used in such statutes, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common law meaning," citing *McCool v. Smith*, 66 U. S., 459.
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> Truelove v. Truelove, 172 Indiana, at page 444.

The cases decided by the United States Supreme Court involving a construction of the Employers' Liability Act, we think, manifest a clear intention to look to the common law for a proper interpretation of the language used and to apply common law principles in its construction.

In *Michigan Central R. Co., v. Vreeland*, 227 U. S., 59, the survival of the right of action which would have accrued to the injured employee, if he had survived, is denied, because at common law the right of action for an injury to the person is extinguished by the death of the person injured. In applying this common law rule to the construction of the Federal Act, Mr. Justice Lurton says:

> "The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employee, it does not pass to his representative, notwithstanding State legislation. The question of survival is not one of procedure, 'but

one which depends on the substance of the cause of action.' *Schreiber v. Sharpless,* 110 U. S., 76, 80; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S., 673.

"Nothing is better settled than that, at common law, the right of action for an injury to the person is extinguished by the death of the party injured. The rule, *'Actio personalis moritur cum persona,'* applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any survival of the right of action created in behalf of an injured employee. That right of action was therefore extinguished. The act has been many times so construed by the circuit courts. We cite a few of the cases: *Fulgham v. Midland Valley R. Co.,* 167 Fed., 660; *Walsh v. New York, N. H. & H. R. Co.,* 173 Fed., 495.

"At common law loss and damage may, in some cases, accrue to persons dependent upon one wrongfully injured, and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services before the death, abates at the death.

"In *Baker v. Bolton,* 1 Campb. 493, Lord Ellenborough ruled that 'in a civil court, the death of a human being could not be complained of as an injury.' *Mobile L. Ins. Co. v. Brame,* 95 U. S. 756, 24 L. ed. 580; *The Harrisburg,* 119 U. S. 199, 204."

Again, in determining that the damages recoverable are such as flow from the deprivation of *pecuniary* benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries, this court turned to the English law for a construction of the word "damages" as used in the Federal Act. Justice Lurton says:

> "The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."
>
> Michigan Central R. Co. v. Vreeland, *supra.*
>
> Garrett v. Louisville & Nashville R. R. Co., decided November 30, 1914.

In the case of *Seaboard Air Line Ry. v. Jas. T. Horton,* 233 U. S., 492; 34 Supreme Court Rep., 635, it became necessary to construe the provisions of the first section of the Federal Employers' Liability Act by which a right of action is conferred (under conditions specified) for injury or death of the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The trial court instructed the jury in such manner as to convey the notion that the duty of the railroad was absolute with respect to the safety of the place of work and of the appliances for the work. In holding this to be error, the instructions were measured by the common law standard of responsibility of the master to the servant. Referring to the provisions of Section 1 quoted above, Mr. Justice Pitney says:

> "This clause has two branches; the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work, or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen."

The same case involved a construction of Section 4, by which assumption of risk is abolished as a defense except where the violation by the interstate carrier of a statute enacted for the safety of employees contributed to the injury or death of the employee. It was held that Section 4 in eliminating the defense of assumption of risk in the cases indicated, "quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action," and in order to determine what assumption of risk is and the extent to which it operates as a complete bar to the action, the court looked to the common law and held that the common law principles must control to the exclusion of all State statutes and decisions on the subject. Mr. Justice Pitney sets forth the principles of the common law applicable to the facts of the case, and says: "In the light of these principles, the rulings of the trial court in the case at bar must be considered."

In stating briefly the departures from the common law made by the Federal Employers' Liability Act, Mr. Justice Van Devanter says:

> "The rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representative of the deceased for the benefit of certain designated relatives."
>
> Second Employers' Liability Cases, 223 U. S., at pages 49-50.

Cases in this court involving the construction of the Interstate Commerce Act, illustrate the application of the common law to the interpretation of acts of Congress.

The validity of a stipulation in a contract for interstate shipment that no suit shall be brought after the lapse of 90 days from the happening of any loss or damage arose in *Missouri, K. & T. R. Co. v. Harriman Bros.*, 227 U. S., 657, in which it is said:

"The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of State law or legislation," citing *Adams Express Co. v. Croninger*, 226 U. S., 499; *Mich. C. R. Co. v. Vreeland*, 227 U. S. 59.

In *Adams Ex. Co. v. Croninger*, 226 U. S., 491, the liability of the initial carrier under the Carmack Amendment is limited to "some default in its common law liability." The court says:

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words,

'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common law duty as a common carrier.

"But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that State legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such carrier conferred by existing State law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to."

As an additional reason for turning to the common law and to the English decisions, we refer to the well recognized principle of statutory construction that where a statute of another State or country is mainly adopted, though not entirely and unchanged, the prior decisions of the foreign court interpreting the statute are entitled to great weight.

2 Lewis' Southerland Statutory Construction, Sec. 404.

"Where one legislature adopts without change of phrascology, or with only a merely immaterial change, a legislative act of another jurisdiction, if antecedent to its adoption the statute had received a settled construction in the jurisdiction from which adopted, the legislature is presumed to have adopted the construction along with the statute. The rule is applicable to the construction of an act of Congress adopted from an English act."

Encyclopedia U. S. Supreme Court Reports, Vol. 11, page 153.

Cathcart v. Robinson, 5 Peters, 264.

Robinson & Co. v. Belt, 187 U. S., at page 47.

The following language of Mr. Justice Lurton, in *Michigan Cent. R. R. Co. v. Vreeland,* 227 U. S., 59, establishes that the Federal Act has as the basis of its enactment Lord Campbell's Act:

> "The statute, in giving an action for the benefit of certain *members of the family of the deceased* is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict., chap. 93, known as Lord Campbell's Act. This act has been in its distinguishing features re-enacted in many of the States, and both in the courts of the State and of England has been construed not as operating as a continuance of any right of action which the injured person would have had, but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death." (Italics added.)

In this case Mr. Justice Lurton sets out the first and second sections of Lord Campbell's Act for convenience in comparison with the Federal Act. (See page 69.) That section provides that "every such action shall be for the benefit of the wife, husband, parent and *child* of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, etc."

The English courts have held that *a bastard is not a child* within the provisions of this section.

Dickinson v. Ry. Co., 2 Hurlstone and Colteman, 734.

At common law the words "parent," "child," "next of kin," and words of similar import, were held to relate only to those who are legitimate.

"By the rules of the common law, terms of kindred, when

used in a statute, include only those who are legitimate unless a different intention is clearly manifested."

McCool v. Smith, 66 U. S., 459.

After stating this principle, the Court says :

> "This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it. The legal position of Alonzo Redman at the time of his death was what the common law made it. In the eye of the law he was *nullius filius*. He had neither father, mother nor sister. He could neither take from nor transmit to, those standing in such relations to him any estate by inheritance."

See also Will Jones v. Marguerite Jones, 234 U. S., 615.

Prior to the enactment of Revisal, Sec. 137 (quoted *post*), the courts of North Carolina recognized the common law rule that an illegitimate child can have no next of kin. In *Coor v. Starling,* 54 N. C., 243, Chief Justice Nash says:

> "Edwin Jones was a bastard, and by the common law no such consanguinity existed between him and his bastard brother as enabled the latter or his issue to claim any portion of his estate, real or personal. A bastard can be no heir to no one, nor can he have any heirs, but of his own body, for being *nullius filius* he is kin to no one."

It has been frequently held by the State courts in which the question has arisen that terms of kindred used in statutes based upon Lord Campbell's Act relate exclusively to legitimate and not to illegitimate children.

Lynch v. Knoop, 118 La., 611.

In this respect the State courts follow the decision in *Dickinson v. Ry. Co.*, 2 Hurlstone and Colteman, 735.

Under the laws of Scotland and Canada, following the common law of England, the death of an illegitimate child creates no cause of action.

Gibson v. Midland R. Co., 2 Ont., 658.

Clarke v. Carfin Coal Co. (1891), A. C., 412.

In South Carolina the statute gives the right of action to the parent or parents. The Supreme Court of that State has held:

> "A mother cannot recover as sole beneficiary under Lord Campbell's Act for the wrongful death of her illegitimate child."
>
> McDonald v. R. R., 71 S. C., 352.

Where the right of action for death by wrongful act is given to recover for the death of a "child" or "children," it has been held by the Supreme Court of Georgia to mean *legitimate child,* and the mother of a bastard was denied the right to recover notwithstanding statutes of the State of Georgia, provided: "Bastards may inherit from their mother and from each other, children of the same mother, in the same manner as if legitimate."

> Robinson v. R. R., 117 Ga., 168.

In *Railroad v. Johnson,* 77 Miss., 727, the Mississippi Supreme Court says:

> "An illegitimate daughter cannot maintain an action for damages caused by the wrongful killing of another illegitimate daughter of the same mother, since our statute creating causes of action for the death of a person, like Lord Campbell's Act, confers the right to sue only on legitimate relatives."
>
> Runt et al. v. Illinois Cent. R. Co., 88 Miss., 575.

In Mississippi, the status of the bastard has been modified by the enactment of a statute providing that "illegitimates shall inherit from their mother and from her other children and from her kindred according to the statutes of descents and distribution."

> "The father of an illegitimate child has no right of action for the child's death under Rev. Stat. 1894, Sec. 267, giving a father a right of action for the death of a 'child,' although the mother is dead and the child

had been acknowledged by the father and had no guardian or next of kin except him."

McDonald v. R. R., 144 Indiana, 459.

We think it will be found that the great weight of authority, English and American, sustains the position that words of kindred, when used in a statute creating a right of action for death by wrongful act, refer solely to legitimates, and the few cases *contra* will be found in States in which the common law status of the bastard has been modified by statute.

Tiffany, Death by Wrongful Act (2 Ed.), Sec. 85.

In construing the expression "next of kin", as used in the Federal Employers' Liability Act, the application of the principle that words of kindred when used in a statute relate only to those who are legitimate, is not affected by State legislation regulating the distribution of personal property.

It is contended by defendant in error that the meaning of "next of kin" for whose benefit the administrator can recover under the Federal Act is to be determined by the statute law of North Carolina and not by the common law and that by the terms of Section 137 of the Revisal of 1905 of North Carolina the legitimate children of a mother, who is dead, are made next of kin of an illegitimate child of the same mother. That section is as follows:

"*Illegitimate children next of kin to each other.* Illegitimate children, born of the same mother, shall be considered legitimate children as between themselves, and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate

shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock."

In support of this contention, counsel for the defendant in error must take the position that the common law does not furnish the true guide for the interpretation of the language of the act of Congress, but the law of the State in which the action is tried is controlling. This was the argument advanced in the Supreme Court of North Carolina, and which was sustained by the Court in the opinion filed in this case. An examination of the opinion, which will be found in the printed record at page 34, will show that the conclusion of the Court is grounded upon the decision of the United States Supreme Court in *Hutchinson Investment Company v. Caldwell*, 152 U. S., 65. It is said that by applying the reasoning in that case to the present case, it follows that "next of kin" of a deceased employee for whose benefit an action may be maintained must be determined by the law of the place in which the action is brought. A consideration of the purpose of the statutes involved in the two cases and the principles of statutory construction applicable, will, we think, show that the Hutchinson Investment Co. case is not authority for the position of the North Carolina Supreme Court. That case involved the construction of the pre-emption laws of the United States, and the right of illegitimate children to have the claim of their father perfected for their benefit, where the father dies before consummating his claim. It appeared that by the statutes of Kansas, which was the State of the domicile of the pre-emptor at the time of his death, and of the real estate in controversy, illegitimate children could inherit from their father when they had been recognized by him, provided such recognition was general and notorious or in writing. The question arose as to whether the illegitimate children of the pre-emptor, who had been properly recognized by him would come within the term "heirs" as used

in section 2269 of the Revised Statutes, which reads as follows:

> "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned."

The purpose of this statute is thus explained by Chief Justice Fuller:

> "The object sought to be attained by Congress was that those who would have taken the land on the death of the pre-emptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. In other words, Titus intended to acquire the title and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it, and by this statute that right could be perfected after his death for the benefit of those who would have been entitled if his death had occurred after patent instead of before. If the provision admitted of more than one construction, that one should be adopted which best seems to carry out the purposes of the act."

In carrying out this object, the Court applied the universal principle of law, "arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

United States v. Fox, 94 U. S., 315, 320.

The application of the *lex rei sitae* in determining the question of the descent and heirship of real estate, is the con-

trolling factor in the case of *Moen v. Moen*, 16 S. D., 214, cited in the opinion of Chief Justice Clark in the present case. In that case it appeared that, prior to the enactment of a statute making every illegitimate child an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, a non-resident alien acknowledged in writing in the presence of competent witnesses that he was the father of an illegitimate and the Supreme Court of South Dakota held that on his death, after the statute took effect, *the child was his heir as to his realty in that state.* In support of this conclusion the Court says:

> "The land in controversy was conveyed by the United States to the 'heirs of John K. Moen.' It was located in the then territory of Dakota, now State of South Dakota. Who are intended as grantees in such a conveyance depends upon the law of the State or Territory wherein the land is situated. *Investment Company v. Caldwell*, 152 U. S., 65. It is an established principle everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *U. S. v. Fox*, 94 U. S. 315."

The case of *Cutting v. Cutting*, 6 Federal Reporter, 259 (268), relied upon as sustaining the opinion of the Supreme Court of North Carolina presents an application of the same principle of construction to an act of Congress relating to the disposition of real property. It is held that upon the death of a married settler, before receiving a patent for the donation, under section 4 of the donation act, and without having exercised the power to sell or devise the same, his interest therein is granted to his widow and children or heirs, and that his heirs are such persons as the local law—the law of Oregon—makes his heirs.

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The principle controlling these cases is stated in *Will Jones v. Marguerite Jones,* 234 U. S., 615, as follows:

> "Inheritance is governed by the *lex rei sitae.* It is not a natural or absolute right, but the creation of statute law. If one claim the right to succeed to the real property of another as heir, and his right is denied because he must trace his pedigree or title to or through an alien, a bastard, or a slave, the question is one to be determined by the local law." Citing *Cope v. Cope,* 137 U. S. 682; *Levy v. McCartee,* 6 Peters 102; *Blythe v. Hinkley,* 180 U. S. 333.

We submit that we are confronted with an entirely different problem in the present case and the authorities cited in the opinion of the Supreme Court of North Carolina are inapplicable.

Congress intended to enact a statute for the uniform benefit of the employees of interstate carriers who are engaged in interstate commerce in case of injury and to certain relatives of such employees in case of death. It was not intended that similar conditions could bring about opposite results, because one action is brought in one State and the other action is brought in another State. It was not intended that the next of kin in Virginia could occupy a different relation from those in North Carolina. But such result is inevitable if the construction of the Supreme Court of North Carolina is adopted and "next of kin" is made dependent upon the statutes of the several States governing descent and distribution. The statute is in derogation of the common law, and we should look to the common law for its limitations. It is written in the language of the common law and we submit that the common law should furnish the rules for its construction, unless Congress has clearly manifested a contrary intention.

In the opinion of the court in the present case, Chief Justice Clark says that "it has been often held that there is no common law for the Federal Courts." This is a correct

statement only when understood as referring strictly to *jurisdiction* in common law cases. Such jurisdiction can never be exercised in the Federal Courts unless conferred by an act of Congress, because of the limited jurisdiction of such courts. In *Rice v. Railroad*, 66 U. S., at page 374, Mr. Justice Clifford makes this explanation of the statement that there is no common law of the United States, and adds: "*but in the construction of the laws of Congress, the rules of the common law furnish the true guide;* and the same remark applies in the construction of the statutes of a State, except in cases where the courts of the State have otherwise determined." (Italics added.)

In a concurring opinion filed in the present case by Associate Justice Walker, the case of *McCool v. Smith*, 66 U. S., 459, is referred to as sustaining the judgment of the Supreme Court of North Carolina, and while it is true, as stated in the concurring opinion, that the common law was in force in Illinois at the time of the enactment involved in that case, and that, therefore, in applying the common law in the construction of the expression "next of kin" as used in the statute, the United States Supreme Court applied the law of the State where the parties were domiciled, the important fact is overlooked that there the court was construing a State statute and not an act of Congress. We cited the case as authority for the position that in the construction of statutes regulating distribution of personal property, the computation must be made according to the rules of the common law. At the time of the enactment of the Federal Employers' Liability Act the common law was in force in the United States, considered as an entity, to the same extent that it was in force in Illinois at the time of the enactment of the statute involved in the McCool case, and Congress is presumed to enact legislation by the guiding light of such law.

Rice v. R. R. Co., *supra*.

Uniformity in the application of the Federal Employers' Liability Act will be entirely destroyed if the expression "next of kin" is to be defined in accordance with the legislation and judicial decisions of the various States.

In its sphere the Federal Act is complete, and in matters of substance it is not to be added to or changed by State regulations. In *Michigan Central R. R. Co. v. Vreeland,* 227 U. S., 54, the late Justice Lurton says:

> "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States."

The Virginia Court of Appeals says:

> "To the act, then, we must look for the law governing the liability of railroads and their employees *inter sese,* and in order to determine their relative privileges, duties, and obligations. It in itself and of itself constitutes the sole and supreme law as to the subjects upon which it touches, and is not to be pieced out by reference to State legislation."
>
> Southern Ry. Co. v. Jacobs, 81 S. E. Rep., at page 101.

> "It is inconceivable that the power of Congress to create a fund for the benefit of the widows and orphans of railroad employees, and to determine the beneficiaries of this fund or to make the personal representative trustee for its distribution in the manner set forth in the statute, is in any manner impaired or affected by the laws of a State governing the distribution of the estate of the deceased."
>
> Doherty Liability of Railroads to Interstate Employees, page 241.

In the recent case of *Taylor v. Taylor,* 232 U. S., 363, it was contended by the defendant in error, father of the intestate, that the distribution of a recovery for intestate's death in an action based upon the Federal Employers' Liability Act should be made according to the statutes of the State of New York. The defendant in error, wife of the intestate, contended that distribution should be made as provided by the Federal Act. On writ of error, the court sustained the contention of defendant in error and held that the distribution of damages is governed entirely by the Federal Act, to the exclusion of any applicable State legislation.

The exclusiveness of the Federal Act and the purpose of Congress to enact a statute of uniform application throughout the United States, are, we think, fully demonstrated by the decisions of this court.

In Second Employers' Liability Cases, 223 U. S., 1, it is said by the court:

> "The natural tendency of the changes declared is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines. We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States, upon all carriers by railroads engaged in interstate commerce, would better subserve the needs of that commerce. . . . True, prior to the present act, the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. . . . The inaction of Congress, however, in no wise affected its power over the subject. . . . And now that Congress has acted, the

laws of the States, insofar as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In *Taylor v. Taylor, supra,* the court says:

"In *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59, it is again said that the act of Congress has undertaken to cover the subject of liability of railroad companies to their employees while engaged in interstate commerce, and that State legislation was superseded by it. 'The obvious purpose of Congress,' it was said, 'was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death.' And again, 'It is one proceeding upon altogether different principles.' "

In *Seaboard Air Line Ry. v. James T. Horton,* 233 U. S., 492, 34 Sup. Ct. Rep., 635, the plaintiff in error contended that, under a proper construction of Section 4 of the Federal Employers' Liability Act, assumption of risk remained as a valid defense to an action brought for the injury or death of an employee, except when the violation by the carrier of a statute enacted for the safety of employees contributed to the injury or death of such employee, and, further, that in applying the principles of assumption of risk, the common law should be the guide, and not the statute law or the decisions of the courts of the various States. This contention was sustained by the Court and language was used by Mr. Justice Pitney, which seems to us to establish conclusively our contention in the present case that uniformity in the application of the Federal Act demands that the expression "next of kin" shall be defined in terms of the common law.

Referring to the provisions of Section 4, Mr. Justice Pitney says :

"By the phrase 'any statute enacted for the safety of employees,' Congress evidently intended Federal statutes, such as the safety appliance acts, and the hours of

service act. For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to State control two of the essential factors that determine the responsibility of the employer."

Again Mr. Justice Pitney says:

"It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several State laws, and not the act of Congress, to control the subject-matter."

In the very recent case of *McGovern v. Philadelphia & Reading Ry. Co.*, decided December 14, 1914, it is held in an opinion by Mr. Justice McKenna, that an action can be maintained, under the Federal Act, for the benefit of non-resident aliens, reversing the United States District Court for the Eastern District of Pennsylvania. The District Court followed decisions of the State Court, construing the Pennsylvania statute creating a right of action for death by wrongful act, and held that the statute had no extra-territorial force, and that non-resident aliens were not within its purview. In arriving at a contrary conclusion Mr. Justice McKenna compares the conflicting decisions of the State Courts in this language:

> "We concede some strength of persuasion to the Pennsylvania decision but to it may be opposed the ruling in other jurisdictions. *Mulhall v. Fallon*, 176 Mass., 266; *Kellyville Coal Co. v. Petraytis*, 195 Ill., 217; *Atchison, Topeka & Santa Fe Ry. Co. v. Mateo Fajardo et ux.*, 74 Kans., 314. In the latter case and in *Mulhall v. Fallon* many other cases are reviewed, including English and Canadian cases, and it was concluded that the weight of authority in this country and in England was that alienage is not a condition affecting a recovery under acts such as that involved in the case at bar."

The result of the decision in the McGovern case is that there will be uniformity in the application of the Federal Act in its relation to non-resident aliens, and in Pennsylvania, where they are denied the right under the State statute, and in Illinois, where they are accorded the right under the statute, they will stand on an equal footing. So, there is in this case a further illustration of the purpose to make the application of the Federal Act uniform and independent of the State legislation and decisions of the State courts.

The extent to which it has been held that the Federal Act is complete and exclusive in its character, is illustrated by *Norton v. R. R.*, 148 N. Y. Supp., 771, in which plaintiff sought to have included in his judgment interest upon his verdict from the time of the death of his intestate as provided by Section 1904 of the Code of Civil Procedure of New York. The Court held that the State statute had no application and denied the right to interest upon the verdict.

If the contention of the defendant in error should prevail, uniformity would give place to utter confusion; we could have a different application of the statute in each one of the numerous States of the Union. Not only is that true, but its application within the borders of any State could be made to fluctuate with the sessions of the legislative body, and the terms of the appellate court, and the next of kin of one year could be denied the right to recover the next. The status of the bastard has probably been made the subject of legislation

in a majority of the States. We venture the assertion that it will rarely be found that two statutes, and their interpretation by the courts, are exactly similar. But if they should be similar, there can be no assurance that they will remain so, when it is considered that the language and its interpretation are constantly subject to change by the State legislatures and the courts. There could be no hope for uniformity in application of the statute and the purpose of Congress to enact a statute that would be operative alike in whatever jurisdiction its principles should be invoked would fail. But the uniformity desired will be secured if the common law is looked to for a correct interpretation of the language of the statute. This would prevent recovery for the death of an illegitimate in whatever jurisdiction the action should be brought. The status of the bastard would be the same in every State and the confusion to which we will refer would not exist. Again, the common law method of computation, which is adopted from the civil law (2 Kent's Commentaries, 13th Edition, star page 592), would be the standard for determining who is next of kin of the deceased employee, and not the various rules adopted by the State legislatures and courts.

In Kent's Commentaries on American Law, it is said:

> "When a person died intestate in the early periods of English history, his goods went to the king as the general trustee or guardian of the State. This right was afterwards transferred by the crown to the popish clergy; and we are told it was so flagrantly abused that Parliament was obliged to interfere and take the power of administration entirely from the church, and confer it upon those who were more disposed to a faithful execution of the trust. This produced the statutes of 31 Edw. III, c. 11, and 21 Hen. VIII, c. 5, from which we have copied the law of granting administrations in this country. The power of granting administration, and of superintending the conduct of the administration, was still left in the hands of the bishop or ordinary in the diocese."

2 Kent's Commentaries (13th Ed.), 409, star page.

The statute 31 Edw. III, c. 11, was enacted A. D. 1357 and required the churchmen to appoint "the next and most lawful friend of the dead person intestate" as administrator. (See 2 Pickering's Statutes at Large, page 113.) This was construed by the courts to require the appointment of the next of blood kin, and relationship was computed by the civil law rule and not by the canon law, and the civil law furnished the rule for determining the nearness of kin under the later statutes of 22 and 23 Charles II, c. 10 (8 Pickering's Statutes at Large, page 349), providing for the distribution of the personal estate of an intestate. (2 Kent's Commentaries, 13th Ed., 420-423, star pages.)

In discussing the course of the law of administrations in England, Blackstone says:

> "But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the Third and Henry the Eighth, before mentioned, direct. In consequence of which we may observe, 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband or his representatives; and of the husband's effects, to the widow, or next of kin; but he may grant it to either or both at his discretion. 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons of equal degree, the ordinary may take which he pleases. 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians, and not of the canonists which the law of England adopts in the descent of real estate, because in the civil computation the intestate himself is the *terminus a quo* the several degrees are numbered and not the common ancestor, according to the rule of the canonists. If a bastard, who has *no kindred,* being *nullius filius,* or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held that the ordinary might seize his goods and dispose of them *in pios usus.* But the usual course now is for someone to procure letters—

> patent or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown."
>
> 2 Blackstone (Lewis's Edition), star pages 504-505.

And at page 515, it is said that in the distribution of the intestate's estate, "the next of kindred are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration."

> 2 Blackstone (Lewis' Edition), star page 515.

This statute of 22 Chas. II, *supra,* provided that where there was no wife or child, the surplusage of the estate of an intestate, after payment of debts, funeral expenses and just expenses of every sort, should be distributed among "the next of kindred in equal degree of or unto the intestate, and their legal representatives."

The civil law, as administered in the Ecclesiastical Courts of England, is part of the common law.

> 1 Blackstone's Com., 79.
> Hale's History of the Common Law, 27, 32.
> Crump v. Morgan, 38 N. C., 98.

In *Patterson v. Winn, et al.,* 5 Peters, 233, Justice Story says:

> "These statutes (3 Edw. VI., ch. 4 and 13 Eliz. ch. 6) being passed before the emigration of our ancestors, being applicable to our situation and in amendment of the law, constitute a part of our common law."

We submit that, at common law, there was a settled rule for the computation of relationship based upon the civil law, and that the expression "next of kin" when used in a statute is used in the sense of the common law as referring to the nearest blood kin computed according to the rule of the civil law. We submit further that in the absence of Congressional enact-

ment removing the common law disability an illegitimate is *nullius filius* and has no next of kin within the language of the Federal Employers' Liability Act. It is only by adopting a fixed rule for the computation of kinship and by having a standard construction of the rule that uniformity in the application of this act can possibly be secured. The statutes for the distribution of personal estate of an intestate vary in the different States, and the methods of computing kinship may be as numerous as the States themselves. It is certain that there is great confusion in the status of illegitimates with respect to the right of inheritance as shown by the decisions of the courts. The following cases are illustrative:

In Alabama one illegitimate child can inherit from another of the same mother. In Missouri he cannot.

Butler v. Land Co., 84 Ala., 384.
Bent's Admr. v. St. Vrain, 30 Mo., 268.

In Tennessee and Vermont legitimate children inherit from illegitimate children, but illegitimate children do not inherit from legitimate children of the same mother.

Woodward v. Duncan, 41 Tenn., 562.
Bacon v. McBride, 32 Vt., 585.

In Pennsylvania illegitimate children inherit from the mother, and the mother from the children, but children cannot inherit from each other.

Woltemate's Appeal, 86 Pa. St., 219.

In Kentucky, when a bastard dies intestate without issue, leaving no mother surviving, the legitimate children of his mother cannot inherit his estate. In North Carolina they can.

Remington v. Lewis, 47 Ky., 606.
McBryde v. Patterson, 78 N. C., 412.

The confusion in the language and the construction of statutes regulating inheritance by, through and from illegitimate persons is strikingly shown in the note to *Croom v. Phelps,* 23 L. R. A., 753-758.

If the laws of the States governing the distribution of personal property are to determine who are next of kin, then in the event the deceased was a resident of another State at the time of his death, our courts would have to look to the law of the domicile to determine for whose benefit the action can be maintained, because "the law of the decedent's domicile governs the distribution of his personal estate."

Smith v. Howard, 41 Am. St. Rep., 537, and note.
Leak v. Gilchrist, 13 N. C., 75.
Alvany v. Powell, 55 N. C., 51.
Medley v. Dunlop, 90 N. C., 527.

In the present case it appears that the deceased was a resident of Boykins, Va., at the time of his death, and we would have to look to the law of Virginia to determine whether an illegitimate child can leave next of kin as defined by the Federal Act. In the absence of pleading and proof of the statute law, it is presumed that the common law is in force in a sister State. (*Hooper v. Moore,* 50 N. C., 130, and numerous cases cited in the concurring opinion of Justice Walker in *Lassiter v. R. R.,* 136 N. C., 89.) This argument leads to the same conclusion as our first contention, and would defeat the plaintiff's right to recover. All of which shows the confusion that will result from holding that the expression "next of kin" as used in the Federal Act is to be intepreted according to State laws. How can uniformity in the application of the Federal law be hoped for when, as is said in 14 Cyc., 24, the statutory provisions of the several States relating to descent and distribution "differ so widely in the terms and language that very few general principles can be deduced from the cases."

If we should carry the contention of defendant in error to its logical conclusion, the right to determine who shall be regarded as next of kin under the Federal Act would be open to regulation by judicial construction of State courts as well as by legislative enactment. As a further result, the State legislatures and courts would have the right to say whether the words of the statute "children of such employee," should include illegitimate children and adopted children, and to say whether "employee's parents" should include the father or mother, or both, of an illegitimate child, or the father or mother, or both, of an adopted child. Further, the State legislatures and courts could define "widow" and "husband," and such definitions would be binding in construing the Federal law. This would give to the States the power to regulate the application of an act of Congress to an extent not justified by the purpose of the act or its language and not sustained by the authorities relating to the construction and application of Federal statutes.

As we have said, it appears in this case that the father of the intestate is living. Is the father of an illegitimate child his *parent* as that word is used in the Federal Act? Certainly he is a parent in the sense of "one who begets or brings forth offspring," which is an accepted definition. Who is to determine this question, the State legislatures and courts or the common law? If the common law, then for like reason we should look to the common law to determine who are next of kin.

We submit, in concluding this branch of our argument, that in determining what relatives fall within the term "next of kin" in an action brought to recover damages for death by wrongful act under the Federal Employers' Liability Act, the rule of the civil law as adopted and made a part of the common law furnishes the true guide, subject to the limitation of the common law that a bastard is *nullius filius* and has no kindred.

If the surviving father of a deceased employee, who was an illegitimate child, is the parent of such employee within the provisions of Section 1 of the Federal Employers' Liability Act, plaintiff is not entitled to recover in this action, because the father of his intestate is living.

If the Federal Act is construed to establish a right of action in favor of the relatives of a deceased employee independent of the question of legitimacy, then, we submit, the plaintiff is not entitled to recover in this action in behalf of the beneficiaries named in the complaint, because it appeared in evidence that the father of the deceased employee was living at the time this action was brought. (See evidence of W. C. Eason, printed record, page 23, and James Lawrence, printed record, page 20.) The same argument that includes next of kin of an illegitimate within the provisions of the Federal Act, it seems to us, of necessity, includes the *parents* of an illegitimate, and the father would have priority as a beneficiary over any collateral kindred. If the evidence in this case should be held insufficient to establish as a matter of law that the father of the deceased employee was living at the time this action was brought, we submit that it was sufficient to entitle the defendant to the instruction, as prayed, that if the jury found that the deceased employee was a son of W. C. Eason (a witness at the trial), plaintiff could recover nothing in his action. (Exception No. 11, printed record, page 27; *ante* page 22.) And further, we submit that the Court erred in instructing the jury as follows on the first issue:

> "If the jury shall find from the evidence that Beb Isaac Capehart, Sills Hardy and Nettie Hardy were all the children of the same mother, then I charge you that at the death of Beb Isaac Capehart, the said Sills Hardy, Joe Hardy and Nettie Hardy are next of kin of said

> Capehart, it being admitted that the mother was dead, that Beb Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury will answer this issue 'Yes.'" (Exception No. 13, printed record, page 29, ninth assignment of error.)

This instruction is based entirely upon the North Carolina statute, Revisal of 1905, Sec. 137, quoted *supra,* making illegitimates next of kin, and it ignores altogether the evidence that the father of the deceased employee was living. We submit that, by this instruction and by refusing to give the request for instruction tendered by the defendant, the Federal Act has been interpreted in a manner prejudicial to the plaintiff in error, for which we are entitled to a reversal of the judgment of the Supreme Court of North Carolina affirming the action of the trial court. This position is, of course, predicated upon the theory that illegitimacy of the employee does not deprive the parents and next of kin of the right to compensation for the death of such employee, a position which we have attempted to show is opposed to the great weight of authority.

If Sills Hardy, Joe Hardy and Nettie Hardy are the next of kin of the deceased employee, plaintiff has failed to show that they were dependent upon such employee.

There can be no doubt that in order to constitute beneficiaries as provided by the act the next of kin must have been dependent upon the deceased employee, and if the plaintiff has failed to establish such dependence, he cannot maintain this action.

> Illinois Cent. R. Co. v. Doherty's Admr. (Ky.), 155 S. W., 1119.
>
> Jones v. C. & W. C. R. R. Co. (S. C.), 82 S. E. 415.

It is incumbent upon plaintiff to bring the brothers and

sister of the deceased, Capehart, within the third class of beneficiaries, provided by Section 1, "*next of kin dependent*" upon him.

Dooley v. R. R., 163 N. C., 454.
Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Admr., 163 S. W., 493.

Averment of pecuniary loss and injury on part of parents is essential, although dependence in the sense in which that term is used in the statute with reference to next of kin is not essential to a recovery for benefit of parents.

Garrett v. L. & N. R. R. Co., 197 Fed., 715, affirmed by United States Supreme Court, November 30, 1914.

In the case of a husband, the wife and children can recover without the necessity of proof of dependency. The same is true of the parents. Where such beneficiaries survive the intestate the damages are measured by the deprivation of expected pecuniary benefit. (*Dooley v. R. R., supra.*) But the clear language of the statute requires that next of kin must be *dependent upon the intestate.*

Something more is intended by the statute than a mere loss of pecuniary benefit by the next of kin. If this is not true, the word "dependent" performs no useful function. It were enough to make next of kin a class of beneficiaries and the construction of the act by the United States Supreme Court would have restricted the right to recover to such next of kin as have been deprived of a reasonable expectation of pecuniary benefit. (*R. R. v. McGinnis,* 228 U. S., 173.) So we submit thee word "dependent" must receive a broader construction than the mere helping to take care of the next of kin by occasional gifts. True, it may not be held to include only such as are legal dependents. There need be no legal obligation to support. (*R. R. v. Vreeland,* 227

U. S., 59.) The word in its ordinary significance does not carry such meaning. The noun "dependent" means primarily "one who depends; one who is sustained by another, or who relies on another for support or favor."

Little v. Caldwell, 158 N. C., 351.

In the case of *Dooley v. R. R., supra,* after discussing the cases of *R. R. v. Vreeland,* 227 U. S., 54; *R. R. v. Didricksen,* 227 U. S., 145, and *R. R. v. McGinnis,* 228 U. S., 173, Mr. Justice Allen says:

> "It would seem, then, that the construction placed upon the act by the Supreme Court of the United States is that the action may be maintained in behalf of widow, or husband or children, or parents, upon proof of a reasonable expectation of pecuniary benefit; *and that when it is for the benefit of others, as next of kin, there must be proof of dependency.*"

Again, it is said in the Dooley case:

> "The beneficiaries are divided into three classes, and it is only when there is none belonging to the first and second classes that an action may be maintained in behalf of more remote relations, next of kin, and *they must be dependent.*"

The words of Stephen, J., in *Stimpson v. Wood,* L. J. Reports (New Series), Vol. 57, Q. B. Div., page 486, apply:

> "There was some evidence that he had occasionally given her a little money, but I attach no importance to this circumstance—a bare chance of receiving some very slight pecuniary help is really a too remote head of damage."

In addition to showing that the beneficiaries received assistance from the decendent, it was incumbent upon the administrator to show a reasonable probability that such as-

sistance would have continued after death. This he failed to do.

Standard Forgings Co. v. Holmstrom (Ind.), 104 N. E., 872.

We think that an examination of the evidence will show that it is insufficient to establish the fact that the brothers and sister of the deceased employee were dependent upon him. When the mother of these children died, Ida Lawrence, her sister, took them to live with her. She says that their mother gave them to her. She further says: "Beb Isaac (the deceased employee) worked and turned over wages to me for children. I took children to take care of them. Beb stayed with me one year and six months. Went away from me; stayed in Bertie until he went to Boykins. Came home twice and stayed two or three days. He brought me money for children. He brought $3.00 one time and also cloth for suit of clothes for each child. Every time he came, he brought money and clothes for children. Children got the biggest part of what he made. He turned it over to me, but I don't know how much, I have the children and take care of them just as I did before Beb died." It also appears from the testimony of Ida Lawrence that these children had been living with her for six years. (Printed record, page 20.)

James Lawrence, witness for plaintiff, testified that he is the husband of Ida Lawrence; that the deceased helped to take care of his brothers and sisters. "He had been gone six years. When he worked for Mr. Purvis, his wages were paid me for children. Towards the last, he gave us more than at first. He gave me $2.50 for children and $2.00 once. This while at Boykins. He also sent money—$1.50. Along every month I got something for children. I gave money to children. I bought clothes for children." (Printed record, page 20.)

W. J. Purvis testified for the plaintiff that the deceased worked for him one and a half years as farm hand; this was three or four years before his death; that he (Purvis) gave

his wages to Jim Lawrence to take care of children; that he paid deceased $12.50 a month and board; that the cost of living was about $9.00 per month.

The whole substance of the testimony is summed up in this: Whenever their uncle, James Lawrence, with whom they were living, would see the intestate, he would give him something for the children. In the three years that he had been away from home James Lawrence had seen him only occasionally. How often is left uncertain; how much he would receive for the children is left entirely to conjecture; the probable duration of the dependency of the children, if they were in fact dependent, is unproved. We earnestly submit that the evidence is totally inadequate to bring the children within the class of "dependent next of kin;" and is too indefinite to be submitted to the jury as a basis for the measurement of damages.

> "The general rule is that in order to authorize a recovery of damages for death by wrongful act, the evidence must show the extent and amount thereof or furnish facts and data from which the jury may approximate the proper amount with reasonable certainty."
>
> 13 Cyc., 361.

> "A party who claims compensation for a legal injury must show, as part of his case, that he has suffered a loss through the injury; and the burden of proving what loss he has suffered is upon him. He is to show, with that reasonable certainty required by the law, the nature and extent of the loss for which he is entitled to compensation; no recovery can be had for any damage which is not satisfactorily proved by the evidence."
>
> Sedgwick on Damages (9th Ed.), Sec. 170.

Finally we refer the Court to the strong dissenting opinion filed in this case by Associate Justice Brown of the Supreme

Court of North Carolina, and concurred in by Associate Justice Hoke, as establishing our contention that plaintiff is not entitled to recover in this action.

All of which is respectfully submitted.

MURRAY ALLEN,
Counsel for Plaintiff in Error.

Raleigh, N. C., December 22, 1914.

Commercial Printing Company, Raleigh, N. C.—Briefs and Records.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted]269

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.

v.

S. W. KENNEY, Admr. of BEB ISAAC CAPEHART, alias BEB ISAAC EASON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

Brief of Defendant in Error.

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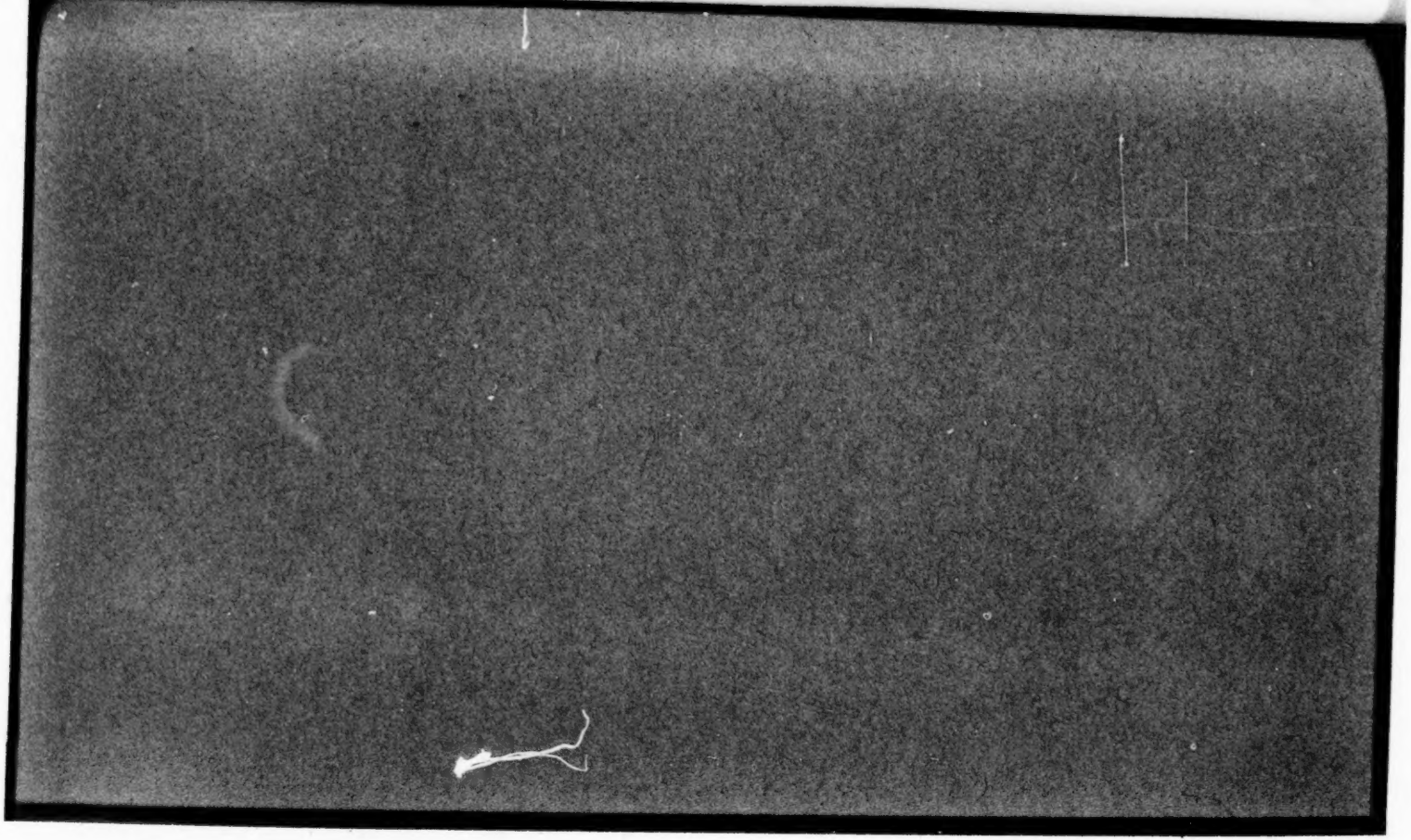

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
v.
S. W. KENNEY, ADMINISTRATOR OF BEB ISAAC CAPEHART, ALIAS BEB ISAAC EASON,
Defendant in Error.
No. 667.

ERROR TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF DEFENDANT IN ERROR.

The writ of error brings up for review, by this Court, the decision and judgment rendered and entered in the cause by the Supreme Court of the State of North Carolina on September 30, 1914, during the fall term of that court. The case is not yet reported; it will appear in the 167 North Carolina Reports.

In the brief of the plaintiff in error a number of questions are propounded to this Court for review that were not passed on by the Supreme Court of North Carolina and which are not embraced within its judgment. In the opinion rendered by that Court (page 35, line 7 of the printed record), Clark, Chief Justice, says:

> "The sole contention of the defendant, requiring our consideration, is that the expression, "next of kin," as used in Section 1 of this Act (Federal Employer's Lia-

bility Act) is to be construed by the common law, disregarding the State law defining these words."

The rule is well established that the appellate court will only permit matters to be assigned for error that were brought to the attention of the Supreme Court below during the progress of the appeal and then passed upon. This is inherent in the very nature of the case and is supported by abundant authorities.

Ice Mfg. Co. v. Joyce, 54 Fed., 332.
Winfield v. Chaffin, 91 U. S., 690.
King v. McLean, 26 L. R. A. (New Series), 799.

In the petition presented by counsel for the plaintiff in error, (page 1, printed record) to Hon. Walter Clark, Chief Justice of the Supreme Court of North Carolina, there are a number of "assignments of error" (page 2, printed record.)

In *Winfield v. Chaffin*, 91 U. S., 690, this Court says:

> "The petition presented to the Chief Justice is no part of what the Court below did unless the opinion of the Court below bears it out. This Court has said we act upon that record."

The record sent from the Supreme Court of North Carolina bears out no such claim of "errors" as the plaintiff in error attempts to set up.

The defendant in error will proceed on this theory and discuss at first only the proposition decided by the Supreme Court of North Carolina; the meaning of the words "next of kin" in the Federal Employer's Liability Act under the facts before the Court. A fair assumption is that the plaintiff in error before the appellate court below rested its case upon that single proposition. That is the only proposition the Court decided.

This cause has been before the Supreme Court of North

Carolina twice. It is first reported in 165 N. C., page 99. No appeal to this court was taken from the decision then rendered, Spring Term, 1914, March 4, 1914. It is not now proposed to review the judgment then rendered, but the judgment this Court is asked to review is the second judgment rendered in the cause by that Supreme Court. All of the incidental questions argued in the brief filed herein were concluded by the decision of the Supreme Court of North Carolina as reported in the 165 N. C., p. 99. Then the Supreme Court of North Carolina gave a new trial on the question of damages simply. It said:

> "(6) A new trial is therefore ordered on the issue of damages and also on the issue of contributory negligence, as under the Federal Act, the negligence of the intestate, if any, is not a defense, but is material in reduction of damages."

It is true that at the instance of the plaintiff in error there was an attempt to try the case again on the issues concluded by the first judgment of the Supreme Court of North Carolina. The Court erred in that, but at the instance of the plaintiff in error. It is therefore now attempting to create an atmosphere of error and then to take advantage of it.

The failure of plaintiff in error to appeal from the first judgment concluded the matters passed upon both by the Court at *nisi prius* and by the Supreme Court. The failure to appeal from that judgment is fatal to points raised in the "Assignment of error," except those embraced in the second judgment of the Supreme Court of North Carolina, and leaves open for review but the one point decided by the Supreme Court of North Carolina in the opinion now complained of.

In the absence of a definition of the words "Next of kin", used in the Act of Congress, Federal's Liability Act of April 22, 1908, does the Statute of Distribution of North Carolina control, or does the common law control, who were the next of kin of deceased?

It was within the competence of Congress to define who were to be considered "next of kin" in the Act. Congress did not do so when the Act was passed, and has never made such definition. Congress preferred that the courts should look elsewhere for such definition. We assume that each State delegation in Congress, when the act was passed would have demanded that the rules of distribution and for ascertaining "next of kin" in each particular State should have been the rule of Congress. Therefore the failure of the Congress to make such definition is clear evidence that the matter was to be left with each State. The question of a multiplicity of rules defining who is "next of kin" is a question for the legislative body; the body enacting the law. It does not appear that Congress was deterred by such fears in passing the Act. It does appear that the Act was deliberately passed without a definition of the words "next of kin" being embraced within it. No fairer argument could be made than that Congress would have added the words "To be ascertained as at common law," if such had been the intention of the law-makers.

STATEMENT OF FACT.

Beb Isaac Capehart alias Beb Isaac Eason was born in Bertie County, N. C., and was the illegitimate son of Emerline Capehart, or Eason. After his birth the mother married a man named Hardy. Three children were born of that marriage: Sills Hardy, Joe Hardy, and Nettie Hardy, for whose benefit this action is brought. The deceased and

the others named are colored people. After the birth of their three children named above, Emerline Hardy and her husband died. Before her death, Emerline Hardy, following a general custom among people of her race and condition gave her children to her sister, Ida Lawrence. At the death of his mother, Beb Isaac Capehart, alias Eason, was large enough to work on the farm. He worked for his aunt and her husband, James Lawrence. He afterwards commenced "working about" for others, coming home from time to time. His home was with his aunt. The railroad of the plaintiff in error passes near the home of the aunt. The *termini* are in Boykin, Va., and Lewiston, N. C. The train on which deecased was killed ran regularly from Boykin, Va., daily to Lewiston, N. C., and return. Deceased was employed as a train hand and brakeman by the plaintiff in error and was paid one dollar and thirty-two cents a day. He was so employed and so paid when he was killed. The plaintiff in error raises here no question of its liability for the death of the deceased. The facts showed the grossest carelessness. At the time of his death deceased was nineteen years old; his brother Sills Hardy was six or seven years of age; his brother Joe Hardy was four or five years of age; and his sister Nettie Hardy was three years of age. It is easily seen that they were dependent upon some one. The brothers and sister lived with their aunt. The deceased was killd at night, at Kelford in Bertie County, North Carolina. On that day, in violation of law, he had been required to work more than five hours of overtime. The evidence shows a number of violations by overtime work occurring close to the time of the accident, which resulted in his death. He was killed December 16, 1912. On December 14, 1912, he had worked twenty hours and thirty minutes. The killing occurred at 8:45 P. M.

ARGUMENT.

Under the facts, does the rule of descent and distribution of North Carolina in ascertaining who are "next of kin" control this matter, or does the rule of the common law control it?

In *Ex Parte Burrus,* 136 U. S., 589, the Court says:

> "The whole subject of the domestic relation of husband and wife, parent and child, belongs to and depends upon the law of the States alone."

So far as defendant in error has been able to learn Congress has never undertaken either to regulate or define these matters except in the territories and District of Columbia.

In *Cope v. Cope,* 137 U. S., 685, this Court says:

> "The territorial Statute of Utah of 1852, which provides that illegitimate children and their mothers inherit in like manner as legitimates, from the father, was valid; so that an illegitimate child whose father died in 1864 in Utah, inherits from the father. *The distribution of and the rights of succession to the estates of deceased persons are matters exclusively of State recognizance,* and were such as were within the competence of the territorial legislation to deal with, as it saw fit, in the absence of inhibition by Congress."

The failure of Congress to inhibit the "next of kin" of Beb Isaac Capehart, alias Eason, taking benefits under the Federal Act in question, as provided for in the North Carolina laws leaves those laws to control in this case.

The claim of plaintiff in error will, in many cases, render the Act of no effect. Many colored people are employed in the very dangerous position of brakeman and train-hand. Their family ties are loose. Their ideas of those things are peculiar to a race just emerged from slavery. The State of North Carolina has been assiduous in passing acts regulating those irregular relationships and giving them the sanc-

tion of law and of property rights. The State of North Carolina is unwilling that the property of a large number of persons of illegitimate birth should escheat to the State, on the ground of a want of "next of kin" or "heirs." Hence the pasage of these very proper statutes of distribution. Without these laws the distribution of property among many colored people would miscarry, and those whose claims have long been recognized would fail to receive property of an ancestor or "next of kin," "begotten on the wrong side of the blanket." The North Carolina law gives a right of recovery to a legitimate brother for an illegitimate brother killed by being violently thrown from the top of a car caused by a "violent kicking" or "flying switch."

One of the controlling cases in the opinion of the Supreme Court of North Carolina was *Hutchinson Investment Company v. Caldwell*, 152 U. S., p. 65. In that case the Act of Congress Rev. Stat., 2269, was under consideration in a Kansas Court. As in the case at bar the trial was had under a Federal Act. We quote from the report of that case:

> "Robert Titus lived in Kansas in which State illegitimate children could inherit from their father when they had been recognized by him, provided such recognition was general and notorious, or in writing. Robert Titus was married to Phoebe Thomas in Vermont in 1801 and the sole issue of that marriage was Alden Titus, born October, 1910. After the birth of their son, Robert Titus, having gone into the war of 1812, abandoned both his wife and child. In 1818 without having obtained a divorce he had a marriage ceremony performed between him and Miriam Lee in the State of New York. By her he had five children, of whom the youngest, Lois, was a daughter who married D. B. Miller. From 1850 Robert Titus lived with his daughter, Mrs. D. B. Miller, and in 1871, the family went to Reno, Kansas, and settled there. In July, 1871, Robert Titus made a pre-emption entry upon the land in controversy but died before consummating his pre-emption claim. After his

death, D. B. Miller, administrator of his estate, filed the necessary papers to complete the pre-emption, paying the price thereof, four hundred dollars to the United States, with his own money and April 20, 1874, a patent was issued to the effect, "That the United States of America in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided hath given and granted and by these presents do give and grant unto the said heirs of Robert Titus and to their heirs above described (here follows a description of the land as set out in the entry).

"To have and to hold the same together with all rights, privileges, immunities and appurtenances of whatever nature unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

"The children of Robert Titus and Miriam Lee were recognized by Robert Titus as his and no question was ever raised as to their legitimacy until this suit. D. B. Miller claimed the fee simple to the land by the conveyance of the heirs of Alden W. Titus as the only heir of Robert Titus, deceased. If the children of Robert Titus and Miriam Lee were heirs within the meaning of Section 2269, Revised Statutes U. S., then Caldwell was entitled to recover an undivided thirteen twenty-eights of the land."

In the case at bar a relationship is claimed under one whose parentage is certain. In the case above cited the relationship was claimed under one who might not have been the father. The maternal source cannot be questioned, not as to the paternal. By the statutes of Kansas which was the State of the domicile of Robert Titus at the time of his death and of the real estate in controversy illegitimate children could inherit from the father when they were recognized by him, provided such recognition was general and notorious, or in writing.

"Under the circumstances declared in the record thereof the grantees in the deed to the heirs of Robert Titus and to their heirs would have embraced the children of Miriam Lee and their heirs and this would be so as

respects the patent unless Section 2269 of the Revised Statutes, under which it was issued, provided otherwise."

The above is taken from decision in the Hutchinson case and the Court then proceeds to say.

"When the party entitled to claim the benefit of the pre-emption laws dies before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party or one of the heirs to file the necessary papers to complete the same, but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

Chief Justice Fuller in delivering the opinion in this case says:

"We are unable to concur with counsel for plaintiff in error that the intention should be imputed to Congress of limiting the words "Heirs of the deceased pre-emptor," as used in the section to persons who would be heirs at common law (children not born in lawful matrimony being therefrom excluded), rather than those who might be according to the *lex rei sitae* by which generally speaking the question of descent and heirship of real estate is exclusively governed. If such had been the intention it seems clear that a definition of this word "heirs" would have been given so as to withdraw patents issued under this section from the operations of the settled rule upon the subject."

That rule was referred to in *United States v. Fox*, 94 U. S., 315-320:

"It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property whether by deed, descent or any other mode, is exclusively subject to the

government within whose jurisdiction the property is situated."

The Congress knew when the Act under question was passed (Federal Employer's Liability Act), that in some States illegitimates could inherit from and were next of kin to legitimates. It knew that Utah, of necessity, had a different law on this subject from the other States of the Union. The Congress could have defined the words "next of kin" in the Act. The fact that it did not do so is a powerful argument and reason for assuming that it was left to the States. The Federal Act provides that these actions may be brought in the State courts. In discussing the case of *Hutchinson Investment Co. v. Caldwell,* 152 U. S., 65, Chief Justice Clark, whose opinion is under review herein, said:

In that case it was contended that the word "heirs" was used in the common law sense. The Court said:

> "Undoubtedly the word 'heirs' was used as meaning at common law, those capable of inheriting but it does not follow that the question as to who possessed that capacity was thereby designed to be determined otherwise than by the law of the State which was both the situs of the land and the domicile of the owner.
>
> "It has been often held that there is no common law for the Federal courts. In *Cutting v. Cutting,* Federal Reporter, 268, the act of Congress prescribed that the heirs of a married settler should receive a patent when he had not taken it out it was held:
>
> "Who are the heirs of Charles Cutting is a matter to be determined by the local law, the law of Oregon, as is also the question of who is his wife. Both of them are left to the local law of Oregon, quoting from *Lambe v. Starr,* 1 Deady, 358.
>
> "Who would be entitled to claim as heir (or wife) of the deceased would in all cases depend upon the laws of Oregon at the time of his death. The same ruling was made as to "next of kin" being governed by the law of domicile in:
>
> McCool v. Smith, 66 U. S. (1 Black), 459.

> "The object of the act of Congress was to permit a recovery for wrongful death or injuries on intestate railroad and that the recovery should go to the 'next of kin' in the cases specified, the 'next of kin' being established by the laws of the State in which the action is brought, for the status of the citizen and the statute regulating descent and distribution is purely a State matter, with which Congress has no concern. By the reasoning in the case above cited the words, 'next of kin' are taken like the word, 'heirs,' as meaning those to whom the property would go, but who are the 'heirs,' and who are the next of kin,' is a matter purely of State regulation.' "

The plaintiff in error cites *Taylor v. Taylor*, 232 U. S., 363. That case was cited in the Supreme Court of North Carolina. It is easy to differentiate that case and the case at bar. In the Taylor case the contention of the wife was upheld because in the Act conferring the right the wife is preferred to the father and the question of the law of the State of the father, or of the State of the wife had no application. The Act itself had spoken on the subject to the exclusion of the State regulation. In discussing this citation we adopt the language of Chief Justice Clark:

> "The decision of *Taylor v. Taylor*, 34 Supreme Court Reporter (232 U. S., 363) , 350, decided February, 1914, holds that the right of action given to the employee survives to his personal representative for the benefit of his parent only when there is no widow and that the Act of Congress prescribing what class are the beneficiaries and the order in which they take controls though the State Statute fixes a different order of succession. But there is nothing in this decision which militates against the holding in *Hutchinson v. Caldwell, supra*, that who are the 'heirs' or 'next of kin' is regulated by the State Statute."

The case of *Taylor v. Taylor, supra*, is authority for the position of the defendant in error, that in matters where the Federal statute defines the State statute is silent, but that in

matters where the Federal statute is silent the State statute defines.

The concurring opinion of Walker, Justice, in the case under review is an interesting and forceful discussion of the case of *McCool v. Smith* above cited. He says:

> "It seems to me that this case is governed by *McCool v. Smith*, 1 Black (36 U. S.), 459, in which the question arose as to the law by which is to be determined who are the 'next of kin' of a person as those words were used in a Federal Statute. The Court then held that the law of the domicile controlled and not the common law and in *Hutchinson v. Caldwell*, 152 U. S., 65, relied on by plaintiff (defendant in error) it is said that in the McCool case the Court decided that the common law governed simply because the State of Illinois where the parties were domiciled had adopted the common law by statute and therefore the term 'next of kin' was construed by the local law, or law of the domicile, as that was the rule of the domicile, as to the law applicable in such cases and Illinois had then only the common law in force. She afterwards enacted a statute of distribution. In the Hutchinson case the same rule was applied as to the meaning of the words 'heirs' and the question was decided by the *lex rei sitae*, the law of the State where the land was situated. In the cases cited by the defendant (plaintiff in error) and in the dissenting opinion the Court was referring to the common law as applicable, when deciding upon the legal rights of the parties, such for instance as the question of negligence where there is no Federal Statute defining those rights or rather the principle by which they are to be determined. The Court therefore held in the McCool case that the 'next of kin' as referred to in the Federal Statute, are those who answer to that description under the State law where the parties are domiciled and not by the common law unless that be the law of that particular State."

Are legitimates next of kin to illegitimates of the same mother? The Act of Congress has no language that in any way bears upon this matter. It says:

"Next of kin dependent upon the deceased."

No decision has yet been rendered by this Court under the Act in question on this particular point. In the absence of Act and decision we are limited to the laws of North Carolina. It was the intention of Congress that this should be done. The language of the Act leaves the case to be tried in the State court. *The jurisdiction to try this cause was in the State court before the Act was passed.* The Act does not confer jurisdiction on the State court. That jurisdiction already existed. The Act confers jurisdiction upon the United States Court concurrent with the State court. Unless there are express limitations in the Act upon the power of the State courts to try then the State courts follow their own rules and decisions. No new right of action is conferred by the Federal Act. It is simply a limitation placed on the common carriers in the nature of the recovery that may be had against them. The Act takes away from common law carriers engaged in interstate commerce a complete defense they had before the passage of the Act, and makes what was a complete defense simply now a cause for reduction in the amount of damages to be recovered. The Act of Congress has given up the right of the Federal courts in these cases to interfere in any particular when the cause is first begun in the State courts.

When a controversy arises as to what law determines the question who are the heirs of a given person or who are the next of kin of a given person the ordinary rules governing the conflict of laws apply. Thus when the property in question is personal property it is governed by the law of the owners domicile, when it is real property by the law of the *situs* of the property.

In *Cade v. Davis,* 96 N. C., page 147, the Court says:

> "The universal doctrine now recognized by the common law, although formerly much contested is that the succession to personal property is governed exclusively by the law of actual domicile of the intestate at the

> time of his death. This is supported by a long array of cases referred to in the foot notes. Story's Conflict of Laws, Sec. 481."

The status of a person is a legal relation in which he stands to the other members of the community, and is governed, as a general rule, by the law of the domicile.

> Lamar v. Micou, 112 U. S., 452.

In *Knights Templars Ins. Co. v. Green,* 79 Fed. Rep., 461, it was held, "that when a policy of insurance was issued in Ohio payable to the heirs of the insured, who were domiciled in New York where all possible beneficiaries lived, the meaning of the word 'heirs' was to be determined by the laws of New York."

The defendant in error submits therefore, that the question of relationship between the beneficiaries in this case and their illegitimate half brother by the same mother is to be determined by the laws of North Carolina where they live. Of course this Court will generally accept the interpretation of the Supreme Court of North Carolina put upon a North Carolina statute. The North Carolina law on this subject is to be found in Section 137 of the Revisal of North Carolina, 1905, and is as follows:

> "Illegitimate children born of the same mother shall be considered legitimate as between themselves and their representatives and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue without living issue his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock."

In the cases of *Powers v. Kite,* 83 N. C., 156, and *McBride v. Patterson,* 78 N. C., 412, the Supreme Court of North Carolina in construing the language of this statute says:

> "The construction given to the rule is that if an illegitimate or natural born child shall die intestate without leaving any child or children his or her estate shall descend to and be equally divided among his brothers and sisters born of the body of the same mother and their representatives, whether legitimate or illegitimate, in the same manner and under the same regulations and restrictions as if they had been born in wedlock."

It is apparent then that the legitimate brothers and sister of Beb Isaac Capehart, alias Eason, were his next of kin.

The defendant in error contends that any propositions not passed upon by the Supreme Court of North Carolina and now raised in the brief or the petition to the Chief Justice of that court cannot be considered by this court.

In the opinion rendered in this case and now under review the Chief Justice of the Supreme Court of North Carolina says:

> "The sole contention of the defendant requiring our consideration is that the expression next of kin as used in Section 1 of this Act, is to be construed by the common law, disregarding the State law defining these words."

The opinion has been on file since September 30, 1914. If the appellate court of last resort in North Carolina has overlooked any vital points raised before it by the plaintiff in error it is the duty of the plaintiff in error to call special attention to that fact and have the court pass upon the particular point before this Court will review that court upon that particular point. Until that is done, either affirmatively or negatively there is nothing on that point for this Court to review. The presumption of law and of fact is that the Court below passed on the questions of law required of it and presented to it, and that if any other question was raised in the brief before it that particular point must have been abandoned on the hearing. That is often the case.

The defendant in error insists that the only question before this Court is the one passed upon by the Supreme Court of North Carolina; and denying the right of plaintiff in error now to raise these other questions, replies to the argument submitted on them in the brief filed in this court. These questions are stated by the plaintiff in error to be: (page 16, printed brief).

1. That the defendant in error has failed to negative the existence of the father of the deceased, who would have prior right as beneficiary as a parent of the deceased.

2. In the present case it appears that the deceased was a resident of Boykin, Va., at the time of his death and we would have to look to the law of Virginia to determine whether an illegitimate child can have next of kin as defined by the Federal Act. In the absence of pleading and proof it is presumed that the common law is in force in a sister State.

The defendant in error denies both the facts stated and the law attempted to be applied to each of these propositions.

(1) It was the duty of the plaintiff in error to demur if proper parties are not named in the complaint. In this case no demurrer was interposed. The plaintiff in error went to trial on the allegations then before the Court. It did not tender an issue covering the point now attempted to be raised. It has nowhere in its pleadings alleged that the father of the deceased was living. There is full proof that the deceased was the illegitimate son of Emerline Hardy. In the first place there is no allegation of the fact that W. C. Eason was the father of the deceased. In the second place there is no presumption arising from a marital status that he was such father. In the third place there is no proper proof of it. The brief correctly assumes that the defendant in error would contend that the admission that his intestate was an illegitimate child dispensed with proof to support the allegation that his father is dead because an illegitimate child is nullus filius and has no father." That is the con-

tention of the defendant in error, pure and simple. But the answer (page 13, printed record) admits that deceased "left no surviving parents." See section 2 and line 3 thereof.

There can be no contention that the name of Eason, by which deceased was sometimes called, fixes his paternity. It is not unusual among that race to have various surnames for members of the same family. But the deceased was an illegitimate child and in law could have no father. The act however does not give a right to recovery simply to a father. It says, "parent." Therefore by the very terms of the act, we are confned to those who occupy a legal relation. A parent is a lawful father. A father may be a lawful father or not, as the facts are. Lawful fathers are parents. The use of the word "parent" in the act shows that the lawful parent was in contemplation. But we do not put the care upon any refinement of language. The deceased was an illegitimate and had no father. If the law of North Carolina permitted the father of the bastard to share in his estate then the argument of the plaintiff in error would be effective. The law of North Carolina has no such provision and under it an illegitimate child has no father, no parent paternal.

(2) The contention that there was a different law regulating this matter in Virginia should have been raised by proper pleading and proper proof. There is no evidence that the deceased was domiciled in Virginia. His home was in North Carolina where his aunt lived, which was the domicile of his mother. This Court is especially pointed to the allegation of the complaint. (Sec. 1, page 10 printed record).

1. "That on or about the 20th day of December, 1912, Beb Isaac Capehart, then a resident of the State of North Carolina, died intestate and the plaintiff, S. W. Kenney, was on the 11th day of February, 1913, appointed and duly qualified as administrator of all and singular the rights and credits, goods and chattels of said Beb Isaac Capehart, such

appointment and qualification being had before the clerk of the Superior Court of Bertie County, and said Kenney, the plaintiff, is now such administrator."

How does the plaintiff in error meet that allegation? By a candid admission? No. By a partial admission of facts it must know and a denial of others? No. By an admission of facts after it had ascertained them and which it could have easily ascertained upon inquiry? No. The very summons served upon the company and a copy of which was left with it shows upon its face the truth of much of the allegations of Section 1 of the complaint which the plaintiff in error in his answer denied. When the plaintiff in error came to answer it then knew that Beb Isaac Capehart, alias Eason, had been for months in its employment. It knew then whether he lived in Virginia or in North Carolina. It knew then whether its train had crushed and killed him. Yet with these facts before it and others easily in reach the answer is:

1. "The defendant has no knowledge or information sufficient to form a belief of the truth of the allegations of Section 1 of the complaint and therefore denies the same."

It does not set up that deceased lived in Boykin, Va., nor that it was not proper to administer in North Carolina. It falls back on a statutory denial and we assume that it does so because it was unable to make the denial in fact. The day for statutory denials about plain matters of fact within the knowledge of the party answering or such as can be easily ascertain has passed. A full, frank and free disclosure is demanded of all matters within the knowledge of the pleader and it is his duty to inform himself before answering. Defendant in error also refers to Section 2 of the complaint: (page 10, printed record).

2. "That he is informed and believes that the death of said Beb Isaac Capehart was caused by his being crushed by one of the wheels of a freight car of defendant while it was

being operated as a part of its freight train by the defendant."

Of all the people in the world who knows whether this be true or not, the plaintiff in error was most likely to know it and did know it. Its records show his employment. Its records show his death. Its records show him working overtime and that on the day he was killed he had worked more than five hours of overtime. Yet with this knowledge the same statutory denial is put in. The defendant in error contends that the denials of allegations 1 and 2 are not sufficient to raise an issue, and in fact that those two allegations are from that fact admitted.

In *Streater v. Streater*, 145 N. C., p. 337, the Supreme Court of North Carolina says:

> "When a complaint alleges matters within the personal knowledge of the defendant it is not a sufficient denial 'That the defendant has no knowledge or information to form a belief.' "

The defendant in error contends that by such evasive denial it is admitted that the deceased lived in North Carolina. At least no such denial of it was made as is sufficient to put the matter now in issue. But we come to the merits. The domicile of Beb Isaac Capehart, alias Beb Isaac Eason, was where his mother lived during her lifetime. After her death his domicile was with his aunt who stood *in loco parentis* to him and to his brothers and sister. They had been given by his mother—Emerline Hardy, doubtless when *in extremis*, to her sister, Ida Lawrence. Deceased was a minor. He was employed on a railroad train and his work took him from and to Boykin, Va. He does not appear to have surrendered his residence and domicile in North Carolina. He seems to have continued a member of the family he was placed with, his aunt's domicile is defined to be:

> "In a strict and legal sense that is properly the domicile of a person where he has his true, fixed, permanent home, and principal establishment and to which whenever he is absent he has the intention of returning."

We must not confine the term residence with domicile. Domicile is more fixed than residence. In all the evidence of plaintiff in error the effort was to show that the deceased had no fixed domicile; certainly that he has acquired none in Boykin, Va., and that he was a "half tramp," kind of hanging around." (See evidence of R. C. Knight and E. R. Bryant, page 26 printed record).

The law presumes that the deceased had a fixed domicile somewhere. We have the deceased fixed with a domicile of origin in North Carolina. He was under age. We have the person who stood *in loco parentis* to him domiciled in North Carolina. He really had no choice of a domicile being under age. He was subject to be carried at any moment to any domicile his aunt might select. The law fixed his domicile with that of the aunt. At any rate it does not appear to have been changed.

If the law of Virginia upon this point is different from the law of North Carolina, it was the duty of the plaintiff in error to set up that law by proper pleading and produce proof. No such contention was passed upon by the Supreme Court of North Carolina.

If not pleaded and proved by those who seek advantage under the laws of another State the presumption is that the law of that particular State is the law of the forum.

In the case of *Lassiter v. Railroad*, 136 N. C., p. 89, from the dissenting opinion in which the plaintiff in error quotes, page ....., printed record, the opinion of the Court through Clark, C. J., says:

> "Minor Conflict Law, Section 214, says, 'that for as good reason the weight of authority is now that in the absence of the pleading and proof the presumption is that the written law of another State is the same as the writ-

ten law here; and citing in a note the authorities thus summed up; certainly the correct weight of authority is in favor of the rule. Nor is it in most instances apt to work any material injustice since a failure of both parties to present to the Court any evidence of the proper foreign law may reasonably justify the Court in presuming that neither party finds anything there which would place him in a position more advantageous than he occupies under the *lex fori* or which would place his adversary in a less advantageous position neither party can be injured by the presumption that the two laws are similar."

Among numerous cases besides those cited by Minor, *supra, sustaining the law are:*

Scroggin v. McClelland, 37 Neb., 644, and many cases cited in that opinion as reported in 22 L. R. A., p. 110. *Wickersham v. Johnson,* 104 Cal., 407, reported in 43 Am. State, 118. *Kuenzi v. Elvers,* 14 La. Ann., 391. Reported in 74 Am. Dec., 434. *James v. James,* 81 Texas, 373. *Haggin v. Haggin,* 35 Neb., 375. *Monroe v. Douglas,* 5 Seld., 447. *Pete v. Hatcher,* 112 Ala., 514, reported in Am. State, 45. *Sandridge v. Hunt,* 40 La. Ann., 766.

In *Scroggin v. McClelland,* 37 Neb., 644, and 22 L. R. A., 110, the question was as to the application of the statute of limitation, the Court says:

"It is also claimed that the drawer has during the whole period resided in Illinois and that the statutory period there is ten years. This may be true but it is neither pleaded nor proved. The Court does not take judicial notice of the law of another State but in the absence of proof it will be presumed to be like that of our own. *Lord v. State,* 17 Neb., 526; *Bailey v. State* (Neb.), 55 North Western Rep., 241. Presuming the law of Illinois to be the same as our own the action had been barred by the laws of that State at the time it was commenced here and was therefore barred here. Code Cir. Proc., Sec. 18; *Hower v. Aultman,* 27 Neb., 251.

> Aside from the failure of proof upon the point the pleadings entirely failed to present the issue. Upon the face of the petition the action was barred, and the demurrer should have been sustained."

It was the duty of the plaintiff in error to plead and present the law of Virginia, if he relied upon it and if it was materially different from the law of North Carolina. He did neither. The presumption is against his contention and in favor of the law applied by the Court. The defendant in error pleaded and presented the law of North Carolina by bringing his action there. The double burden is not on him of pleading and proving his own as well as the contention of his adversary.

The defendant in error insists that the action for wrongful death and the recovery thereunder constitute no part of a decedent's estate. The recovery would not be of anything that ever belonged to him. The place of injury is therefore the place of distribution. Where the cause of action accrued is where the distribution is to be had. The accident and the killing occurred at Kelford, Bertie County, N. C., and even if an action had been brought in the State of Virginia and a recovery had been had there the law of North Carolina would cover the distribution. Under the case at bar we have both the place of injury and the place of recovery in North Carolina. This is so even if it be admitted that the deceased lived in Virginia; and this, defendant in error denies and the proof sustains the denial.

Debrick v. Central R. R. Co., 103 U. S., 11.

An infant is incapable of changing his domicile.

Marks v. Marks, 75 Fed. Rep., 321. To the same effect are cases from Georgia, Indiana, Iowa, Louisiana, New York, Pennsylvania, Texas.

The domicile of an adopted child during minority follows the domicile of the adoptive parent.

In Re Johnson, 87 Iowa, 130.

The aunt of deceased stood *in loco parentis* to him. Her adoption of him was complete.

After the death of both parents the domicile of the minor will be that of his origin, or if that has been changed by the parents his domicile will be that of his last surviving parent. The mother of the deceased died domiciled in North Carolina.

Holyoke v. Haskins, 5 Pick. (Mass.), 20 reported in Am. Decisions, 372.
Louisville v. Sherly, 80 Ky., 71.
Jenkins v. Clark, 71 Iowa, 552.
Warren v. Hofer, 13 Ind., 167.
Grimmet v. Wetherington, 16 Ark., 377.
Vann Matre v. Sawkey, 148 Ill., 536, reported in 39 Am. St. Reports, 196, citing 5 Am. & Eng. Ency. of Law (First Ed.), 866.

So we have both the actual and legal domicil of Beb Isaac Capehart, alias Beb Isaac Eason, in North Carolina, the killing occurring in North Carolina and the action brought in North Carolina. The distribution therefore must be according to the law of North Carolina and under that law the beneficiaries named are the next of kin of the deceased.

Among the arguments advanced by the plaintiff in error for its construction of the statute is the one of uniformity; that if the law of domicile is applied there will be confusion. It is absolutely impossible to have a uniform application of the law of the domestic relations. We have a diversified country and it would not be proper for the Congress to set up one set of "heirs" and one set of "next of kin" in a State and have the legislature of that State setting up another set of heirs and another set of next of kin. That would pro-

duce worse confusion than even the plaintiff in error fears, "confusion worse confounded."

We reply however to this argument by quoting the language of Chief Justice Clark: (page 35 printed record).

> "The contention that the next of kin must be the same in all the States is not in accordance with the intent of the Act. Indeed there can be no uniformity if that was desirable, for there is no common law in Louisiana and the common law is much modified in some of the States acuired from Mexico and France and on many subjects the rule of common law has been held different in the different States."

SECOND CONTENTION: DEPENDENCE.

We now come to the second real contention in this case; and this is the contention not passed upon by the Supreme Court of North Carolina. This is another of those contentions that the record presumes plaintiff in error abandoned.

(2) If it be true that Sills Hardy, Joe Hardy and Nettie Hardy are the next of kin (to deceased) it does not appear that they were dependent upon deceased within the meaning of the act.

The act is also silent as to the extent of the dependence. The act does not say totally dependent, or partially dependent. It simply says "next of kin dependent upon the deceased." The evidence in this case discloses a state of actual dependence, the extent of which was for the jury. There was a state of actual dependence. It is not necessary that the dependence should have been exclusively upon the deceased. The recovery can be only to the extent of the dependence and no further. If these beneficiaries were dependent upon the deceased for any part of their support and had any reasonable ground for expectation of a continuance of that support then the defendant in error can recover for their benefit the loss that they have sustained by the wrongful death at the instance of the plaintiff in error. For

this position we cite *Dooley v. Railroad,* 163 N. C., page 454.

Michigan Central R. R. v. Vreeland, 227 U. S., 59.

There was no objection taken by the plaintiff in error to the charge of the trial judge on the question of damages. In fact the Court at *nisi prius* charged the jury on the subject of damages in the exact language of the defendant (plaintiff in error). These children were of tender years and therefore dependant upon someone. Deceased worked and turned over his wages for the children. "Every time he came he brought money and clothes for the children." "Children got biggest part of what he made." This is the evidence of Ida Lawrence(page 20, printed record). The evidence of James Lawrence was to the effect "Beb helped to take care of his brothers and sister. When he worked for Mr. Purvis his wages were paid me for the children. Towards the last he gave us more than he did at first. Along every month I got something for children." (Page 20, printed record).

W. J. PURVIS.

W. J. Purvis testified: "I knew the deceased. I remember when his mother died and he went to Lawrence. He gave wages to Jim to take care of children. He was an average boy. He was about 15 years old. I paid him $12.50 per month and board." (See printed record, page 20).

The extent of dependence is a question of fact for the jury. The evidence is ample to support the findings of the jury on this issue. The jury seems to have remained within moderate bounds. At any rate no motion was made to set aside the verdict on the ground that it was excessive. The dependents were young. The deceased was a strong railroad train-hand and brakeman, from his close and intimate association with engineers, agents and conductors as set out in

the record (pages 21, 22, 23 and 24 of the printed record) he seems to have been a universal favorite with them—a man with a future on the railroad in the line of his hard work. In Vreeland case above cited this Court says:

> "The pecuniary loss is not dependant upon any legal liability of the injured person to the beneficiary."

That is not the sole test. There must however appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. The rule for the measure of damages must differ according to the relation between the party plaintiff and the decedent.

> "According as the action is brought for the benefit of husband, wife, minor child or parent for the loss of services or support to which the beneficiary was legally entitled or is brought for the benefit of a person whose damage consists only in the loss of a prospective benefit to which he was not legally entitled."

In *Am. R. R. Co. v. Dedrickson,* 227 U. S., 145, the Court says:

> "The damages recoverable are limited to such loss as result to them because they have been deprived of a reasonable expection of pecuniary benefits by the wrongful death of the injured employee."

The Court approves this language in *Gulf Col. and Sante Fe R. R. v. McGinnis,* 228 U. S., 173.

The deceased was strong and hearty. He was employed in the most hazardous and dangerous employment by the plaintiff in error who owed extreme care in selecting men of character and capacity which it put in charge of life and property. As a farm laborer and a mere lad his wages were $12.50 a month. Much of that he gave to the support of his brothers and sister. His wages at death were $1.32 a day and considerably more when being worked overtime,

contrary to law. "Towards the last he gave us more than he did at first." Evidence of Jas. Lawrence (page 20 of the printed record). With increasing wages there were increased benefits conferred.

In *Dooley v. R. R.*, 163 N. C., page 463, the Supreme Court of North Carolina says:

> "This furnishes sufficient evidence to a finding that the next of kin had a reasonable expectation of pecuniary benefit from the continuation of the life of the brother."

In concluding the brief counsel for plaintiff in error refers to the dissenting opinions of Brown, J., and Hoke, J., governing in this case. It is significant that the dissenting opinion did not touch upon the question of "dependence." That is a strong presumption to the effect that the point was yielded before the Court and not urged and therefore should not now be considered.

The brief of plaintiff in error devotes some space to the discussion of whether the Federal Employer's Liability Act embraces this case. Defendant in error admits that it does.

The brief also quotes authority to the effect that the Federal law is supreme. Defendant in error admits that it is.

The brief also devotes much space to a discussion of the requirement that there should be an allegation of beneficiaries and of the absence of those entitled to prior claims to the action. The record shows such allegation (page 15, printed record, and the answer to it, page 16, printed record).

If the allegation was insufficient a demurrer was in order.

We conclude this brief with the statement that the only question passed upon by the Supreme Court of North Carolina was a definition of "next of kin" under the act. All other questions raised in the brief and in the assignments of error presented to the Chief Justice of North Carolina are presumed to have been abandoned in that court. There

was no appeal from the first decision rendered in the cause, 165 N. C., p. 99, and all of the matters now urged upon the Court except the question of amount of damages were concluded by that decision.

"Next of kin" in the act under discussion are next of kin defined by the North Carolina law."

The North Carolina law defines the beneficiaries named in the complaint as the next of kin of the deceased.

The dependence of the legitimate brothers and sister of deceased upon him was an actual one. They were at an age of dependence.

The plaintiff in error admits in the answer that the deceased left no surviving parent. Its contention that there is such father fails.

The act does not mention the father as a beneficiary, but says parent, therefore it is such parent as the law recognizes.

There was no allegation nor proof of a law in Virginia different from the law in North Carolina. It was the duty of plaintiff in error to plead and prove it.

Deceased was a minor aud incapable of making choice of a domicile. He was fixed by the domicile of his origin.

Deceased stood in the relation of child to Ida Lawrence to whom his mother gave him.

The domicile of the mother continued to be the domicile of the minor after her death until his arrival at the age of maturity.

The domicile of the deceased mother, the domicile of the origin of deceased, the domicile of the person who stood in loco parentis to the

deceased, were all in North Carolina. It matters not where deceased stayed. The domicile was in North Carolina.

The deceased was killed in North Carolina. The qualification of the administrator was had in that county and state.

The action was brought in that county and state.

Under all the facts of this case the presumption is conclusive that the law of the forum applies.

Respectfully submitted,

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Commercial Printing Company, Raleigh, N. C.—Briefs and Records.

SEABOARD AIR LINE RAILWAY *v.* KENNEY, ADMINISTRATOR OF CAPEHART, ALIAS EASON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 269. Argued March 10, 1916.—Decided April 3, 1916.

The Federal Employers' Liability Act, in so far as it deals with the subjects to which it relates, is paramount and exclusive, and recovery under it can be had only in the mode prescribed, and by and for the persons in whose favor it creates and bestows a right of action.

The Federal Employers' Liability Act contains no definition of who are to constitute the next of kin to whom it grants a right of recovery, and the absence of such definition indicates the purpose of Congress to leave the determination of that question to the state law.

There is no merit in the contention that Congress intended that the term "next of kin" was used in the Employers' Liability Act in its common-law significance and as excluding all persons not included in that term under the common law.

The ruling of the state court in this case that the next of kin of an intestate, who was illegitimate, were his half brothers and sisters legitimately born of the same mother, excludes by implication the possibility of an asserted father being the parent and person entitled to recover under the Employers' Liability Act.

167 Nor. Car. 14, affirmed.

THE facts, which involve the construction and application of the Employers' Liability Acts of 1908 and 1910, and the determination of who are the next of kin entitled to maintain an action thereunder, are stated in the opinion.

Mr. Murray Allen for plaintiff in error:

The alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy, who are legitimate children of the mother of the deceased employee, who was an illegitimate child, are not the next of kin of such employee within the provisions of § 1 of the Federal Employers' Liability Act.

The surviving father of a deceased employee, who was an illegitimate child, is the parent of such employee within the provisions of said section of the Act.

If the alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy, are next of kin of the deceased employee, they were not dependent upon such employee, as required by said section.

Allegation and proof of the existence of beneficiaries, as defined by the Federal Employers' Liability Act, are essential to a right to recover damages for the death of an employee.

The expression, "next of kin," as used in the Act, is to be construed in the light of the common law.

At common law the words "parent," "child," "next of kin," and words of similar import, were held to relate only to those who are legitimate.

In construing the expression, "next of kin," as used in the Employers' Liability Act, the application of the principle that words of kindred when used in a statute, relate only to those who are legitimate, is not affected by state legislation regulating the distribution of personal property.

Uniformity in the application of the Employers' Liability Act will be entirely destroyed if the expression "next of kin" is to be defined in accordance with the legislation and judicial decisions of the various States.

If the surviving father of a deceased employee, who was an illegitimate child, is the parent of such employee within the provisions of § 1 of the act, plaintiff is not entitled to recover in this action, because the father of his intestate is living.

Numerous authorities both state and federal are cited in support of these contentions.

Mr. Francis D. Winston, with whom *Mr. J. H. Matthews* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The trial court on the verdict of a jury entered judgment against the plaintiff in error for the sum of $800 for the negligent killing of Capehart who was one of its employees, and this writ of error is prosecuted to reverse the action of the court below affirming such judgment. (167 Nor. Car. 14.) At the time of his death Capehart was a minor and was employed by the defendant company as a switchman. The accident occurred in North Carolina on an interstate freight train moving from a point in North Carolina to one in Virginia. The suit to recover was specifically based on the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, as amended April 5, 1910, 36 Stat. 291, c. 143, and as both parties concede that that act was applicable, that subject may be put out of view.

The deceased was a natural or illegitimate child born in North Carolina, and the next of kin for whose benefit the administrator sued, he having been qualified at the alleged domicile of the deceased in North Carolina, were three minor children of the deceased's mother, the issue of a marriage by her contracted after his birth, she the mother being dead at the time of the accident. There was no question in the court below as to non-liability because of an absence of negligence, since as pointed out by the court the sole contention pressed upon it for reversal was that the damages for the death had been awarded to persons who were not entitled to the recovery as next of kin under the act of Congress, even although they were the next of kin by the law of the State. Thus the court said: "The sole contention of the defendant requiring our consideration, is that the expression 'next of kin,' as used in § 1 of this act [the act of Congress] is to be construed by the common law, disregarding the state law defining those words." After then quoting from the state statute on the subject, the court further said: "It is very clear that in North Carolina the two half brothers and the sister of the intestate are his next of kin. It seems to us immaterial whether it were formerly otherwise in this State, either by statute or the common law before any statute. The question is, who was the 'next of kin' at the time of such death in the State where the wrongful death occurred?" Proceeding to examine and decide this question, it was held that next of kin for the purpose of the recovery under the act of Congress were the next of kin as established by the law of the State where the right to recover obtained. And it is the correctness of this ruling which we are alone called upon to consider, since despite the great number of assignments of error which are made, they all in last analysis depend upon that question. We need not stop to review the assignments to demonstrate this fact, since in argument they are all stated as embracing the solution of three

inquiries, which as we shall see when we consider them, will be virtually disposed of by deciding the single question concerning the correctness of the ruling of the court below as to the next of kin under the statute. The three questions thus stated are in substance as follows: First, whether the minor children who under the law of North Carolina were the next of kin of their natural or illegitimate brother because of their common motherhood were the next of kin under the act of Congress? Second, if in the absence of a parent they were so, would the proof of the existence of an asserted father of the deceased make such person his parent within the act of Congress, excluding the right of the next of kin to recover the damages? Third, if the minor brothers and sister were next of kin under the act of Congress, had they such dependency on the deceased as gave them any right to recover under the act?

We consider the questions separately.

1. There can be now no question that the act of Congress in so far as it deals with the subjects to which it relates is paramount and exclusive. It is therefore not disputable that recovery under the act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action. *Second Employers' Liability Cases*, 223 U. S. 1; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Taylor* v. *Taylor*, 232 U. S. 363; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 501. But this is irrelevant, since the controversy concerns only the meaning of the act which it is conceded, when rightly interpreted, is entitled to exclusive operation.

Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress

plainly indicates the purpose of Congress to leave the determination of that question to the state law. But it is urged as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common law significance and therefore as excluding all persons not included in the term under the common law, meaning of course the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the States and substituted another law for it, when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition since if it be well founded, it would apply equally to the other requirements of the statute—to the provisions as to the surviving widow, the husband and children, and to parents, thus for the purposes of the enforcement of the act overthrowing the legislation of the States on subjects of the most intimate domestic character and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the States, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others.

But we need go no further since the want of merit in the

contention is fully demonstrated by authority. In *Hutchinson Investment Co.* v. *Caldwell*, 152 U. S. 65, the matter under consideration was § 2269, Rev. Stat., giving to the heirs of a deceased preëmptor who had died before completing his entry the right to perfect the same, the statute providing, "But the entry in such cases shall be made in favor of the heirs of the deceased preëmptor and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned." The controversy was whether the word heirs under the statute should be taken in its common law meaning and therefore not to give a right to complete the entry to illegitimate children who had been recognized by their father, the preëmptor, and who were his heirs under the law of the State of Kansas where the land was situated and where the deceased preëmptor was domiciled. The court said: "We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words 'heirs of the deceased preëmptor' as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the *lex rei sitæ*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word 'heirs' would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. . . . But it is contended that the word 'heirs' was used in its common law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as

to who possessed that capability was thereby designed to be determined otherwise than by the law of the State which was both the situs of the land and the domicile of the owner" (pp. 68, 69). And there is no ground for taking this case out of the rule thus announced upon the theory that the controversy involved the title to real estate, contracts concerning which are governed by the law of the situs, since we are dealing here with the subject of next of kin which so far as legislative power is concerned under our constitutional system of government is inherently local and to be determined by the rules of the local law. And this is well illustrated by *Blagge* v. *Balch*, 162 U. S. 439, which involved a controversy as to the distribution of French spoliation claims awarded under an act of Congress providing "That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy . . ." Without going into detail concerning the controversy in that case it suffices to say that if the next of kin entitled to take under the act of Congress had been ascertained under the rule of the common law, there would have been one result, and if determined by the law of the State controlling distributions, another and different result followed. Coming to determine the significance of the words "next of kin" from the act itself and its context, the court said (p. 464); "And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective States of the domicile of the original sufferers."

2 and 3. The suggestion rather than contention that if the state law be held applicable to determine next of kin, the right should have been recognized to seek to trace the paternity of the illegitimate child so as to make the

asserted father the parent under the statute, might well be disposed of by saying that no such contention seems to have been urged in either of the courts below. But aside from this, the entire want of merit of the proposition is at once demonstrable from a two-fold point of view: (a) because it was necessarily foreclosed by the ruling of the court below as to the state law concerning the next of kin and the right of the brothers and sister of the illegitimate child to inherit from him solely because of a common motherhood, a ruling which excluded by necessary implication the right now contended for. (b) Because as no provision, either of the state law or of the common law, supporting the asserted right is referred to, the suggestion may be taken as simply a typical illustration of the confusion of thought involved in the main proposition relied upon which we have previously adversely disposed of.

In so far as it is suggested that there was no proof tending to show a dependent relation between the next of kin who were recognized and the deceased so as to justify recovery under the statute, it suffices to say that it was expressly foreclosed by the finding of the jury sanctioned by the trial court and was not questioned in the court below, and at all events involves but a controversy as to the tendencies of all the proof foreclosed by the action of both courts which we would not reverse without a clear conviction of error, which after an examination of the record on the subject we do not entertain. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464.

Affirmed.